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\* \* \*

1 (Tuesday, October 23, 2018, commencing at 9:31 a.m.)

2 **P R O C E E D I N G S**

3  
4 THE COURT: Good morning. I'll hear from you on  
5 your Rule 50 motion.

6 MR. PUZELLA: Yes, your Honor. The defendant  
7 Walmart moves under Rule 50(a) for judgment as a matter of  
8 law on three issues.

9 One, the issue of whether Variety has proven that  
10 it has valid marks for the two unregistered marks that it  
11 claims that Mr. Blackburn described. That's Backyard BBQ and  
12 Backyard standing alone.

13 Two, as for all of the marks, the absence of a  
14 likelihood of confusion, a reasonable jury could find based  
15 on the evidence submitted to this point that there is a  
16 likelihood of confusion on any of the marks that Variety  
17 claims.

18 And three, on the issue of willfulness and intent,  
19 particularly in that there's been insufficient evidence  
20 submitted on the evidence of intent or willfulness such that  
21 no jury could find in Variety's favor on that.

22 That's all, your Honor.

23 THE COURT: Okay.

24 MR. PUZELLA: We have a written copy just for the  
25 record so there's no ambiguity as to the motion.

1           THE COURT: Thank you. Do you want to say  
2 anything?

3           MR. ADAMS: Just briefly, your Honor.

4           As far as validity is concerned, Walmart has  
5 stipulated that the trademark registration was valid. I  
6 think it's important at this point to remember what the  
7 Fourth Circuit said in its remand opinion, courts give  
8 dominant -- give the dominant part of the mark more weight in  
9 assessing similarity. That's an open question which has been  
10 returned to this court for consideration by a jury. That was  
11 express.

12           As far as BBQ and Backyard are concerned, case law  
13 in the Fourth Circuit is clear that the scope of a registered  
14 trademark is not the literal language of the trademark, but  
15 it has sufficient scope to cover anything that is closely  
16 related to it.

17           One of the best cases, and I'm sure it's one you're  
18 familiar with, the Synergistics case, where the Court said  
19 that Windshield Doctor and Glass Doctor were sufficiently  
20 similar. One of the marks was registered, the other one was  
21 the infringement.

22           As far as likelihood of confusion is concerned, Mr.  
23 Blackburn testified at some length about the circumstances  
24 under which the products are sold, and the Fourth Circuit has  
25 already indicated that with respect to five -- I think it's



1 five -- of the factors that the jury must consider, they have  
2 already been waived and found in Variety's favor. That alone  
3 would make it improper to direct judgment in Walmart's favor.

4           Insofar as willfulness is concerned, the fact that  
5 Walmart knew about our registration and used it anyway is by  
6 itself sufficient to find willfulness; but beyond that,  
7 you've also got the fact that after they expressly learned of  
8 our use -- not our registration, but our actual use -- they  
9 kept on using it. On two or three different situations where  
10 they were given further information about our use and the  
11 intensity of our objection, they kept on using it. That in  
12 itself is enough to justify a finding by the jury of  
13 willfulness.

14           THE COURT: All right. I'll deny the motion at  
15 this time.

16           And are you going to put on any evidence?

17           MR. PUZELLA: Yes, your Honor. Before we move on  
18 to the evidence, we have an additional motion that we would  
19 like to file. I don't need to argue it at this time, but I  
20 just wanted to make the Court aware of it.

21           We intend to file a motion to strike the trial  
22 testimony and evidence regarding Walmart's continued use of  
23 its Backyard Grill and design trademark as evidence of  
24 willfulness, as counsel just described, or in the  
25 alternative, requesting a supplemental jury instruction on

1 the fact that proof of continued sales after notice of a  
2 claim cannot be evidence as a matter of law of bad faith.

3 So we intend to file that. I can hand courtesy  
4 copies of the JMAL motion and that motion to your clerk, but  
5 we'll also file both of those by ECF now. Is that  
6 acceptable, your Honor?

7 THE COURT: Yes.

8 MR. PUZELLA: I'll provide counsel with copies as  
9 well.

10 MR. LONG: Your Honor, we have a motion we would  
11 like to make before the jury gets in here. It's our  
12 understanding that Walmart intends to call a witness named  
13 David Ortiz to testify about the removal of The Backyard  
14 trademark from Walmart's stores. This occurred, of course,  
15 after our summary judgment motion, and I think it's  
16 controlled by your Honor's recent order on the sell-through  
17 agreement, so that the removal occurred after that date and  
18 it's about that trademark that these parties are here  
19 disputing.

20 MS. GARKO: Your Honor, Mr. Ortiz is not going to  
21 discuss the removal of the trademark. What he's going to  
22 talk about is the introduction of the products that did not  
23 have The Backyard trademark on them, which were a different  
24 product. And your Honor has already addressed that issue in  
25 the prior motion. They are not the trademark products, they

1 are products without the Backyard Grill name.

2 THE COURT: Anything else?

3 MR. LONG: I mean, those products with the Backyard  
4 Grill name -- we're here to talk about The Backyard  
5 trademark, not some other random marks that they applied to  
6 our product.

7 MS. GARKO: Your Honor, it goes to strength of the  
8 mark explicitly.

9 THE COURT: Anything else?

10 MR. LONG: The strength of a different mark. Not  
11 The Backyard mark.

12 MS. GARKO: It's evidence -- the absence of the  
13 name and the fact that sales didn't go down, that everything  
14 continued as it was and no one noticed that they were selling  
15 a product that had no name, is evidence of the strength of  
16 The Backyard Grill mark, which plaintiff has expressly put in  
17 issue because of the fact that they have alleged reverse  
18 confusion.

19 MR. LONG: I don't know how you can talk about that  
20 without talking about removal. I don't know how that comes  
21 up --

22 THE COURT: This is so inappropriate. You're  
23 arguing with each other. That's why civil lawyers are so  
24 uncivil. Lawyers in all the criminal trials I have, which  
25 dominate our practice, would never think of behaving like

1 this. Just sit down. Both of you.

2 Bring the jury in.

3 (Jury in at 9:38 a.m.)

4 THE COURT: You can have a seat.

5 Good morning, ladies and gentlemen. You've heard  
6 the case in chief from the plaintiff. Now the defense has  
7 the opportunity to offer evidence.

8 Do you have any witnesses?

9 MS. GARKO: Yes, your Honor. We call Marvin  
10 Deshommes.

11 **MARVIN DESHOMMES**

12 having been duly sworn, testified as follows:

13 THE WITNESS: I do.

14 THE CLERK: You may take a seat in the witness box.  
15 Watch your step.

16 MS. GARKO: Your Honor, if I may briefly distribute  
17 binders with the exhibits that are going to be used with Mr.  
18 Deshommes to the clerk --

19 THE COURT: You want to give him a book?

20 MS. GARKO: May I distribute binders with the  
21 exhibits to the clerk, yourself, the witness and opposing  
22 counsel?

23 THE COURT: Yeah.

24 (Attorney Garko distributing exhibit binders)

25 ///

**DIRECT EXAMINATION**

BY MS. GARKO:

Q. Good morning.

A. Good morning.

Q. Can you please introduce yourself to the jury.

A. My name is Marvin Deshommes.

Q. Where do you work?

A. I work at Sam's Club.

Q. Is Sam's Club related to Walmart?

A. It's a division of Walmart.

Q. And how long have you -- I'm sorry, what's your job at Sam's Club?

A. My job is a vice-president, divisional merchandise manager, of seasonal categories in merchandising.

Q. And how long have you done that?

A. I've done that a little over four years.

Q. Did you also work at Walmart?

A. Yes, I did.

Q. And what year did you begin working at Walmart?

A. In 1994.

Q. And can you please give the jury just a brief overview of the positions you've held at Sam's Club and then at Walmart?

A. At Walmart I started off as a buyer trainee. Worked in the stores and worked in the office in domestics

1 and ladies wear and merchandising. And then I was promoted  
2 to a regional buyer for souvenirs and then a buyer for books  
3 and magazines, and then I was promoted to a senior buyer for  
4 toys, and then I was promoted to a senior category director  
5 for outdoor entertaining, which are categories within the  
6 lawn and garden space. And then my current position is the  
7 vice-president, division merchandise manager at Sam's Club.

8 Q. What position did you hold at about 2011, 2012?

9 A. I was the senior category director for outdoor  
10 entertaining categories.

11 Q. At Walmart?

12 A. At Walmart, yes.

13 Q. And generally what were your responsibilities in  
14 that position?

15 A. I was responsible for the strategy implementation  
16 for those categories and the buyers that led those  
17 categories.

18 Q. Did you have any responsibility for Walmart's  
19 private label products within outdoor entertaining at that  
20 time?

21 A. I did.

22 Q. Can you please briefly explain to the jury what a  
23 private label product is?

24 A. A private label program or product would be a store  
25 brand. Basically we would put the packaging together and

1 produce that for customers.

2 Q. What private label brands, if any, were you  
3 responsible for while you worked at outdoor entertaining?

4 A. Among others, one would have been the Backyard  
5 Grill and design mark.

6 Q. And were you involved in selecting or creating the  
7 Backyard Grill brand?

8 A. I would have been involved in the implementation of  
9 the Backyard Grill and design mark, yes.

10 Q. You referred to it as the Backyard Grill and design  
11 mark. Why do you refer to it like that?

12 A. It's a combination of the name Backyard Grill, but  
13 there's also a logo that's embedded into the name Grill as  
14 the I. It's a logo of a grill itself. And that becomes the  
15 whole Backyard Grill and design is what I'm talking about.

16 Q. And what is that brand, what is the Backyard Grill  
17 brand?

18 A. It's a private label brand that we created for the  
19 grilling categories, and there's subcategories underneath  
20 that, that speaks to the entry price point or opening price  
21 point customer.

22 Q. You mentioned opening price point. Does Walmart  
23 offer goods at different price points?

24 A. We do. There's typically three tiers of  
25 merchandise or three different levels of merchandise that we

1 carry.

2 Q. What are those three levels?

3 A. They're typically called good, better or best when  
4 you look at those three different tiers.

5 Q. Can you just briefly explain what the good, better,  
6 best categories are?

7 A. Sure. At the good it would be typically the lowest  
8 price and least amount of features. At the better there's  
9 more features involved at a higher price. And at the best it  
10 would be all the bells and whistles with the most amount of  
11 features at usually the highest price, and typically you  
12 would see premium brands like a Weber or Char-Broil in that  
13 segment.

14 Q. And what category do the Backyard Grill products  
15 fall into?

16 A. At the good level.

17 Q. Why did Walmart want to adopt a private label brand  
18 for grills and grilling accessories in the good category?

19 A. Twofold. One was to lower the cost of the goods,  
20 and the second would be with that number of items and that  
21 number of subcategories we had a lot of third parties or  
22 different labels, brands, in that segment and to de-clutter  
23 it, make it more of a simpler shopping experience was the  
24 other portion of the reason.

25 Q. I'm sorry, why was the category cluttered?



1           A.     So there's just -- at that good level, a lot of  
2     different items and a lot of different suppliers, they all  
3     had their own brand, their own look, and it looked disheveled  
4     or confusing for a customer to understand where all the good  
5     items are. And so that would be the reason why, because of  
6     the number of supplier brands that were in that segment.

7           Q.     And so was it part of the goal of the Backyard  
8     Grill brand or the private label brand to provide --

9           THE COURT REPORTER:   Could you repeat the question,  
10    please.

11          MS. GARKO:   Yes.

12          Q.     (By Ms. Garko)   Was the goal then that the private  
13     label brand would provide some level of organization to that  
14     clutter?

15          A.     Yes.   It was an organizing principle that brought  
16     all the good items together in one field.

17          Q.     You also mentioned that having a private label  
18     brand would reduce cost. How does having a private label  
19     brand reduce cost?

20          A.     Sure.   So part of Walmart's mantra would be  
21     everyday low cost, and in this particular segment when you  
22     have a lot of different third-party suppliers there are what  
23     we would call middlemen, and they're adding costs into the  
24     structure because they have a particular brand.

25          By us creating the look and feel of a private

1 brand, we're able to put the packaging together, work out our  
2 own specs, and then go to the market and do what we call a  
3 request for proposal and talk to manufacturers about building  
4 a particular item for that particular spec and getting it at  
5 the lowest cost, which we then transfer that to a lower  
6 retail, which make the items more advantageous for customers.

7 Q. Was the purpose of adopting a private label brand  
8 to cause customers to purchase products based on that brand  
9 name?

10 A. No.

11 Q. What was the goal then?

12 A. The goal was twofold. One, to lower the cost, and  
13 two, to de-clutter the space and make it more of a simple  
14 organizing way for the customer to shop.

15 Q. Were those goals dependent on the particular name  
16 that was chosen?

17 A. No.

18 Q. What were you looking for in a name?

19 A. We were looking for a name that would resonate with  
20 those particular categories in the grilling segment.

21 Q. What do you mean by resonate or fit with the  
22 category?

23 A. We wanted a name that was not going to be  
24 objectionable to our customers, something that would not do  
25 any harm that would basically fit with that particular

1 category.

2 Q. Based on your experience, do you have an  
3 understanding of what does cause customers to purchase grills  
4 and grilling accessories at the opening price point or good  
5 level at Walmart?

6 A. I do.

7 Q. What is that?

8 A. Based on 20 years of merchandising plus, more than  
9 ten years in the grilling category, it's typically around  
10 price and features that would be the deciding factor along  
11 with the quality level that's there. Deciding factors to  
12 make a purchase.

13 Q. Name is not one of those deciding factors?

14 A. At the premier or the best level, recognizable  
15 names are a deciding factor or more recognizable at that  
16 point.

17 Q. At the opening price point are they deciding  
18 factors?

19 A. It's typically the price and the features that you  
20 get at that level.

21 Q. Now, Mr. Deshommes, you have a binder in front of  
22 you?

23 A. I do.

24 Q. Do you see that? Could you please turn to D-56 in  
25 that binder.

1 A. Okay.

2 Q. Do you recognize that document?

3 A. I do.

4 Q. What is it?

5 A. It's the Backyard Grill brand overview from  
6 August 2012.

7 Q. This is a Walmart document?

8 A. It is.

9 MS. GARKO: Your Honor, we move D-56 into evidence.

10 THE COURT: It will be received.

11 **(Defendant's Exhibit No. D-56 received into evidence)**

12 Q. (By Ms. Garko) Mr. Deshommes, could you please  
13 turn to page 2 of that document. It has the number WM01047  
14 at the bottom.

15 A. Okay.

16 Q. Do you see the top where it says, "Key Learning  
17 March 2011"?

18 A. Yes.

19 Q. What does that refer to?

20 A. It's the initial research that was done on the  
21 naming of Backyard Grill.

22 Q. And this was done prior to Walmart selling any  
23 products with Backyard Grill on them?

24 A. Yes.

25 Q. And so it was prior to Variety making any sort of

1 complaint about Walmart using Backyard Grill?

2 A. Yes.

3 Q. I would like to walk through some of these bullets  
4 and talk about them a little bit. What was the first  
5 conclusion that was reached concerning research that you  
6 did --

7 THE COURT REPORTER: I'm sorry, could you repeat  
8 the question.

9 Q. (By Ms. Garko) What was the first conclusion that  
10 was reached in the research for March 2011?

11 A. That Backyard Grill and Backyard Barbecue obtained  
12 similar scores in customer preference.

13 Q. And what's the significance of that first  
14 conclusion, if any?

15 A. That both names, Backyard Grill or Backyard  
16 Barbecue, were on similar footing. They did -- one did not  
17 score better than the other.

18 Q. And is the Backyard Barbecue reference there  
19 Variety's Backyard Barbecue?

20 A. No, it was not.

21 Q. What's that a reference to then?

22 A. It was another name that we were considering at the  
23 time initially for our entry price point of grills and  
24 grilling accessories.

25 Q. Did Walmart ever end up using Backyard Barbecue on

1 any product?

2 A. No.

3 Q. To your knowledge was Walmart even aware of  
4 Variety's use of Backyard Barbecue when it did this research?

5 A. No.

6 Q. Looking at the second conclusion, what's the second  
7 conclusion that was reached in the March of 2011 research?

8 A. "Grill names do not have a large impact on  
9 shoppers' decisions when cost, features and benefits are the  
10 same. When shopping based on name alone, shoppers migrate  
11 towards well-known recognizable names."

12 Q. What are the well-known recognizable names referred  
13 to there?

14 A. Char-Broil or Weber would be a couple.

15 Q. Would Backyard have been considered a well-known  
16 recognizable name?

17 A. No.

18 Q. And what's the third conclusion that the March 2011  
19 research reached?

20 A. "Judging grills by name, shoppers are most likely  
21 to choose well-known brand names."

22 Q. Are those the same well-known brand names we just  
23 discussed, Char-Broil and Weber?

24 A. They are.

25 Q. That does not include Backyard, correct?

1           A.     No, it does not.

2           Q.     What's the fourth conclusion that was reached?

3           A.     "If Backyard Grill was the only available brand,  
4 shoppers are more likely to continue shopping than to make a  
5 purchase decision on the spot."

6           Q.     What does that mean?

7           A.     The name Backyard Grill was not a decision-making  
8 or deciding decision-making for making a purchase.

9           Q.     What's the fifth conclusion that the March 2011  
10 research reached?

11          A.     "The majority of the shoppers have no brand  
12 preference if cost, features, and benefits of both brands are  
13 the same. It doesn't matter 60 percent of the time, Backyard  
14 Grill 24 percent, Sam's Choice, 16 percent."

15          Q.     And what's the significance of that last  
16 conclusion?

17          A.     The overwhelming majority of the consumers do not  
18 care about the brand that they were going to purchase in this  
19 segment.

20          Q.     Is it a weak brand then?

21          A.     Yes. The name is not the consideration, the  
22 decision-maker for this consumer.

23          Q.     What was the overall take-away from this March 2011  
24 research?

25          A.     That brand name was not the deciding factor for

1 making a purchase decision for the consumer at the good entry  
2 price point.

3 Q. And if you look at the bottom portion of that  
4 document, do you see there's a portion that says, "Follow-up  
5 Research January 2012"?

6 A. Yes.

7 Q. What does that refer to?

8 A. After the product was in the marketplace, we did  
9 follow-up research to confirm or review what our initial  
10 research was on the particular brand.

11 Q. Why did you do that follow-up research?

12 A. It was to validate whether our findings were true  
13 and make sure that we understood what was the impact to those  
14 decisions.

15 Q. And generally, what did that follow-up research in  
16 January 2012 show?

17 A. It reconfirmed the initial research that the brand  
18 name was not the compelling reason to make a decision.

19 Q. Let's look at those bullet points for a minute.  
20 Can we focus on the first one. Can you read that to the  
21 jury?

22 A. Sure. "Open-ended responses/questions were asked  
23 of respondents to better understand the customer's view and  
24 awareness of brands. Unaided, a large majority of  
25 respondents could not name the brand they currently owned,



1     only the retailer where purchased."

2           Q.     What, if anything, does a majority of respondents  
3     not being able to name the brand of grill they currently own  
4     tell you?

5           A.     In my experience if you're going to buy a grill and  
6     you don't remember the brand that you're going to purchase,  
7     that's not a decision-making for the customer.

8           Q.     And how does it tell you that?

9           A.     Because they were unable to name the grill that  
10    they bought.

11          Q.     Would you expect customers to remember the brand  
12    name of a grill they bought if that brand name was important  
13    to them?

14          A.     I would.   If it's a grill that lasts three to four  
15    years in your house, you would expect to remember the brand  
16    name.

17          Q.     Now, is the creation of a private label brand at  
18    Walmart limited just to selecting a name?

19          A.     No.

20          Q.     What else is involved?

21          A.     There's a couple of factors.   It's the packaging,  
22    it's the color scheme that you would use, it's the particular  
23    logo that you would implement on the particular items  
24    themselves.   It's the features and how you would call them  
25    out as well.

1           Q.     And how do you go about determining how the  
2     different things should be put on the packaging and how the  
3     overall product should be configured?

4           A.     We do research, we do competitive research, we go  
5     look at other retailers, how they're merchandising that  
6     particular category or putting them on the shelf and go take  
7     pictures and things of that nature.

8           Q.     Can you please turn to D-53 in the binder in front  
9     of you.

10          A.     Okay.

11          Q.     Do you recognize that document?

12          A.     I do.

13          Q.     What is that?

14          A.     It's March 14, 2011, Backyard Grill competitive  
15     marketplace photos.

16          Q.     And so this is again from before Walmart started  
17     selling its Backyard Grill products, correct?

18          A.     Correct.

19          Q.     And before Variety had any complaint about Walmart  
20     selling those products, correct?

21          A.     Yes.

22          Q.     Could you just generally explain what this document  
23     is about?

24          A.     It's a glance at the retailers, other retailers who  
25     are doing the majority of the business in the grill space,

1 over 70 percent, and a visual representation of what we would  
2 call their side counters or modulars, which is the shelving  
3 unit that you would look at as a customer when you walk into  
4 the store, and looking at the categories of grilling or  
5 grilling accessories for those categories by retailer.

6 MS. GARKO: Your Honor, we move D-53 into evidence.

7 THE COURT: Received.

8 **(Defendant's Exhibit No. D-53 received into evidence)**

9 Q. (By Ms. Garko) Why was this presentation created?

10 A. It gives us insight into what does the retail  
11 landscape or the other retailers and how they are treating  
12 the category, how they merchandise the category, what their  
13 packaging looks like for this particular segment.

14 Q. And what did that look at the marketplace reveal,  
15 if anything?

16 A. The category had different boxes on the shelves,  
17 some were hanging, some were on shelves, some were big boxes.  
18 Similar color schemes whether it was red, black, gray, as  
19 some of the more consistent color schemes that you would see,  
20 but they weren't necessarily calling out features in a  
21 consistent manner by retailer.

22 Q. Let's look at page 3 of that presentation for a  
23 moment. It has the number on the bottom WM00863. Do you see  
24 that?

25 A. I do.

1           Q.     Do you see a bullet there that says, "Clearly  
2 Communicating"?

3           A.     Yes.

4           Q.     What does that bullet say?

5           A.     "Clearly communicating the features is important to  
6 selling to the predominantly male buyer. Men don't typically  
7 buy benefits the way women do. Men know what they want and  
8 buy the feature, so clear and exact communication of the  
9 facts is key. This is reflected almost universally in these  
10 examples."

11          Q.     What does that mean?

12          A.     We need to be clear and concise when we're talking  
13 to a consumer who is predominantly male and calling out the  
14 features in a very factual way.

15          Q.     And how do you do that? How do you make sure  
16 you're being clear and concise and calling out the facts?

17          A.     We would essentially make the item the hero, call  
18 attention to the item or the item description. So in this  
19 case we would have said a four-burner gas grill, or we would  
20 have also said it's one of the features maybe. Instead of  
21 trying to think of -- it's a 200 square inches, we would say  
22 20 burgers, it can cook 20 burgers, just to kind of make  
23 those facts very well known to someone.

24          Q.     Does this document that looked at the competitive  
25 landscape when you were designing packaging look at Variety

1 at all or Variety's brand of products?

2 A. No, it did not.

3 Q. Why not?

4 A. Variety was not in -- we looked at the marketplace,  
5 we looked at who was driving the bulk of the sales. We  
6 talked to suppliers, we talked to industry data. Variety  
7 would have never come up in any one of those discussions with  
8 any one of our multiple suppliers and industry data as  
9 someone in this space who was driving anywhere near the bulk  
10 of the volume for the market.

11 Q. Could you now please turn to D-54 in your binder.

12 A. Okay.

13 Q. What's this document?

14 A. It's dated March 21st, 2011. "Backyard Grill,  
15 Initial Thoughts on the Creative."

16 Q. And again, this is from before Walmart started  
17 selling the Backyard Grill products?

18 A. Yes.

19 Q. And before Variety lodged any complaint about those  
20 products?

21 A. Yes.

22 Q. Can you just generally describe what's in this  
23 document?

24 A. It's the steps to purchase and then some initial  
25 concepts of some of the packaging looks for the particular

1 category of the grilling, grilling categories.

2 MS. GARKO: Your Honor, we move D-54 into evidence.

3 THE COURT: Received.

4 **(Defendant's Exhibit No. D-54 received into evidence)**

5 Q. (By Ms. Garko) Could you please look at the third  
6 page of this document, which has the number at the bottom  
7 WM00901. Do you see there's the numbers one, two, three?

8 A. I do.

9 Q. What's set out in those paragraphs?

10 A. It's a prioritization or the steps to purchase for  
11 these particular categories.

12 Q. And the particular category you're talking about is  
13 grill?

14 A. Grill category, yes.

15 Q. Could you focus for a minute on the step number 2  
16 there.

17 A. Okay.

18 Q. What does that say?

19 A. Number two says, "Men buy features, women buy  
20 benefits. To sell a grill to a man, we need to deliver the  
21 technical specs in a clear, concise way with a minimum of  
22 reading. Men want to know something is 900mhz, women want to  
23 know how those 900mhz will help them more than 800mhz. In  
24 many regards, males are an easier sell, particularly if your  
25 product will out perform other products. With the ladies, we

1 have a lot more explaining to do."

2 Q. What does that mean?

3 A. It meant for the men who were buying this category  
4 if we could call up the facts in a clear way, that would be  
5 the selling feature that would differentiate us in the  
6 marketplace.

7 Q. Let's focus now on step 3 for a moment. What does  
8 that step talk about?

9 A. Step 3. "A majority of manufacturers in this  
10 category are using very similar color pallets and  
11 photography. This is an excellent opportunity for Walmart,  
12 since a very effective way to catch attention is to do things  
13 a little different so attention is captured. Once you have  
14 their eye, deliver these tech specs and it's your one-two  
15 punch that will get this product to the cash register."

16 Q. So what does that tell you?

17 A. This tells us once again kind of what I was  
18 describing earlier, is we want to tell you the facts about  
19 the business in a very clear way. And so the square inches  
20 would be an example of -- instead of trying to say what 200  
21 square inches is and trying to get people to understand what  
22 that is, we can say it can cook 20 burgers. We would make  
23 the item the hero and make that prevalent, and we would just  
24 say it's a four-burner gas grill in that example just to call  
25 attention to the item.

1           Q.     And did the design of the Walmart grill and  
2     grilling accessories product packaging that were sold under  
3     the Backyard Grill name take into account the thoughts on how  
4     the purchasing process works?

5           A.     Yes.

6           Q.     And how did it do that?

7           A.     It made the item the hero. It really focused on  
8     that being the center of the packaging as you saw it and it  
9     would call out the item description and then it would call  
10    out the features in an overt way. The naming of Backyard  
11    Grill with the design mark was in a secondary position or on  
12    the side or on the back of the product.

13          Q.     Why not have Backyard Grill stand out and be the  
14    focus of attention?

15          A.     It really wasn't about the name brand, it was more  
16    about the organizing principle. Once again, lowering the  
17    cost, de-cluttering the space, making it simple to shop and  
18    making that item the hero, not the brand name the hero.

19          Q.     If the focus was on the brand name, how would that  
20    appear to the customer?

21          A.     If the focus was on the brand name, we would have  
22    put Backyard Grill logo front and center on all the packaging  
23    and make that the most dominant thing that you would see on  
24    the packaging.

25          Q.     And how would that impact the consumer shopping



1 experience?

2 A. It would have still been confusing if you were  
3 going to walk up to a sea of items that all said Backyard  
4 Grill. You would still have to sort through and figure out  
5 which items you're going to purchase, which -- going back to  
6 our two primary reasons was to lower the cost and to  
7 de-clutter the space. And so having a sea of Backyard Grill  
8 would not necessarily solve our second issue, which would be  
9 de-cluttering the space.

10 Q. Was it in any way Walmart's intention to have the  
11 Backyard Grill name a reason the customers bought Walmart's  
12 private label grills and grilling accessories?

13 A. No.

14 Q. Was it Walmart's intent to trade on any goodwill  
15 created by Variety through the use of Backyard BBQ or  
16 Backyard when it chose the Backyard Grill name?

17 A. No.

18 Q. Was it Walmart's intention to confuse consumers and  
19 make them think that Walmart's grills and grilling  
20 accessories were somehow associated with Variety?

21 A. No.

22 Q. Was it Walmart's intention to make consumers think  
23 that Variety's grills were somehow associated with Walmart?

24 A. No.

25 Q. And did you even know that Variety used Backyard or

1 Backyard BBQ on grills and grilling accessories when you  
2 approved the use of Backyard Grill?

3 A. No.

4 MS. GARKO: I have no further questions, your  
5 Honor.

6 THE COURT: Do you have any cross?

7 MS. TRIMMER: Yes, your Honor.

8 **CROSS-EXAMINATION**

9 BY MS. TRIMMER:

10 Q. Good morning, Mr. Deshommes. I'm Christina Trimmer  
11 and I just have a few questions for you.

12 You testified that you were the individual that  
13 would have been most responsible for the private brand grill  
14 program, correct?

15 A. Yes.

16 Q. And you are the person who initiated the request to  
17 have Backyard Grill brand placed into the categories of  
18 grilling at the entry price point, correct?

19 A. I was the one who requested for a private label to  
20 be introduced in the entry price point, and then the naming  
21 of it did become Backyard Grill with the design mark.

22 Q. Okay. And this was an important project for you,  
23 was it not?

24 A. It was a project, yes.

25 Q. And you devoted a lot of resources in coming up

1 with the name for the private label grill program; is that  
2 correct?

3 A. We went through the research to go find out what  
4 names are available and then put that on the proper  
5 packaging, yes.

6 Q. And you had a brand team working on the project,  
7 correct?

8 A. Yes.

9 Q. And you had a legal team working on the project,  
10 correct?

11 A. Yes.

12 Q. When you initiated the request, was it more than  
13 just about having a single low-priced Walmart grill within  
14 the category, correct?

15 A. State your question again.

16 Q. When you initiated the request, the request was  
17 more about just having one low-priced Walmart house grill,  
18 correct?

19 A. The request was to have a private label program at  
20 the entry level price point to lower the cost and to  
21 de-clutter the space.

22 Q. And the request was to develop a name for that  
23 product, correct?

24 A. The request initially was that we wanted to  
25 introduce a private label program at the entry price point.

1 That would have been the initial request I would have asked  
2 for to senior leadership to allow us to go down that path.

3 Q. And the request included coming up with a name for  
4 that product, correct?

5 A. We would have started off by saying that we want  
6 to start off at the good level with a private label program  
7 and that would have been the initial request. Yes, there  
8 would be a name that associates with it. Yes.

9 Q. Okay. Thank you. Does Walmart have any other  
10 private brands?

11 A. They do.

12 Q. Could you list some of Walmart's other private  
13 brands for us?

14 A. Some would be Mainstays, Better Homes and Gardens,  
15 Sam's Choice to name a few.

16 Q. And you work for Sam's Club now, correct?

17 A. I do.

18 Q. And does Sam's Club have any private brand?

19 A. Members Mark -- yes, we do.

20 Q. But out of all these private brands that Walmart  
21 owns, Walmart didn't use one of these other private brands  
22 for the grilling category, did they?

23 A. No, we did not.

24 Q. And you mentioned the private brand Mainstays,  
25 correct?

1           A.     I did.

2           Q.     And Walmart uses Mainstays at the lowest price  
3 point category, correct?

4           A.     In several categories, yes.

5           Q.     In fact, Mainstays was one of the brands used for  
6 grilling accessories in the lowest price point category  
7 before Walmart adopted Backyard Grill, correct?

8           A.     Correct.

9           Q.     And Walmart owns the trademark to Mainstays,  
10 correct?

11          A.     I would assume so but -- yes.

12          Q.     So Walmart could have easily left Mainstays as the  
13 brand in the lowest price point for grilling category  
14 requiring no effort on Walmart's part, but they didn't do  
15 that, did they?

16          A.     It was only on grill accessories, but we did not  
17 apply it to other categories.

18          Q.     And Mainstays did not perform as high as Backyard  
19 in the consumer insight surveys, did it?

20          A.     I think on this document we talked about Sam's  
21 Choice. I don't remember Mainstays being as part of the --  
22 one of the names that we talked about. It could have been, I  
23 just don't remember it.

24          Q.     Okay. And in the document that you were talking  
25 about previously, you mentioned Sam's Choice. And Sam's

1 Choice actually performed lower than Backyard Grill, correct?

2 A. In the respondents, yes.

3 Q. And Walmart would consider Sam's Choice to be a  
4 valuable trademark, wouldn't it?

5 A. Depending on the category.

6 Q. So your testimony today is that Backyard Grill  
7 brand has no value; is that correct?

8 A. My testimony is that we put Backyard Grill and the  
9 design on products that resonated or fit with the grilling  
10 category.

11 Q. And does Walmart ever use Backyard Grill not with  
12 the logo?

13 A. Not to my knowledge.

14 MS. TRIMMER: Can we pull up PX-6, please.

15 THE COURT: When is this from, what year or period?

16 Q. (By Ms. Trimmer) Mr. Deshommes, have you ever seen  
17 this advertisement before?

18 A. It seems like a Walmart tab or something, which  
19 would be a monthly advertisement that we would put out in the  
20 marketplace, from some years ago.

21 Q. And do you see that underneath the price for the  
22 grill it says Backyard TM Grill?

23 A. I'm sorry, which one are you referring to?

24 Q. It's actually blown up here just to the right of  
25 the --

1           A.     Got it.  Yes, it has the Backyard Grill with our  
2 logo, yes.

3           Q.     And do you see below that it's just the words  
4 Backyard, with the TM symbol, Grill?

5           A.     Yes, I do see that.

6           Q.     And do you have an understanding of what the TM  
7 means?

8           A.     I think it's trademark.

9           Q.     Thank you.

10           MS. TRIMMER:  Your Honor, we would move PX-6 into  
11 evidence.

12           THE COURT:  It will be received.

13           **(Plaintiff's Exhibit No. PX-6 received into evidence)**

14           Q.     (By Ms. Trimmer)  Mr. Deshommes, you would agree  
15 that Walmart's products need a brand name, correct?

16           A.     We wanted an organizing principle to make it a  
17 simpler shopping experience for the customer.

18           Q.     So you testified that the product's the hero, but  
19 Walmart didn't just have a grill that listed the features  
20 with no name, correct?

21           A.     It would have had a name brand on it, yes.

22           Q.     So consumers expect to see a name, correct?

23           A.     I don't know what the consumers expected.  They  
24 want to find their items and purchase them.

25           Q.     Well, you've done a lot of research in this area,

1 correct?

2 A. We have done research, yes.

3 Q. And on the process of coming up with the Backyard  
4 Grill brand, that process took several months, didn't it?

5 A. It did.

6 Q. How many individuals from your team were working on  
7 this project?

8 A. My direct team?

9 Q. Correct.

10 A. It would have been myself, the buyer, and maybe the  
11 buyer's assistant at that point in time as far as my direct  
12 team.

13 Q. And how many individuals from the brand team were  
14 working on this project?

15 A. That I dealt with, two or three people.

16 Q. And then how many individuals from the legal team  
17 were working on this project?

18 A. It would have been primarily the brand team to work  
19 with them, but I would imagine one or two people, that I  
20 would have had some knowledge of.

21 Q. And how many individuals from the consumer insight  
22 survey team were working on this project?

23 A. It's kind of within the brand team and I don't  
24 exactly know that -- we don't have that many people doing  
25 that many things.



1           Q.     And Walmart conducted three consumer insights on  
2 just the name alone, correct?

3           A.     We've done a few. I don't know if it was two or  
4 three.

5           Q.     And then after Walmart conducted consumer insight  
6 surveys, we heard testimony from Ms. Dineen yesterday that  
7 the next step was to clear legal, correct?

8           A.     They typically would go through legal and go  
9 through some type of vetting process or filter process that  
10 would run through different names, yes.

11          Q.     And we heard testimony yesterday that Walmart  
12 wasn't able to use its first choice, Grill Master; is that  
13 correct?

14          A.     There was a name that was -- it probably was Grill  
15 Master, sure.

16          Q.     And Grill Master wasn't available, was it?

17          A.     I don't believe so.

18          Q.     Did you know that Walmart tried to obtain a license  
19 for Grill Master?

20          A.     I did not know that.

21                 MS. TRIMMER: May I approach the witness with some  
22 exhibits, please?

23                 (Attorney Trimmer approaching the witness stand and providing  
24 the witness with exhibits)

25          Q.     (By Mr. Trimmer) If you could please turn to

1 Exhibit 80(A).

2 THE COURT REPORTER: I'm sorry, the exhibit number  
3 again please.

4 MS. TRIMMER: 80 (sic).

5 Q. (By Mr. Trimmer) It's listed as 80 in your  
6 notebook.

7 THE COURT REPORTER: Thank you.

8 Q. (By Ms. Trimmer) Do you recognize the individuals  
9 on this e-mail?

10 A. I do.

11 Q. And who is Erick Moreira?

12 A. He used to work on the brand team at Walmart.

13 Q. And Karen Dineen is also an employee of Walmart?

14 A. She is, yes.

15 Q. And could you just read Erick's e-mail to Karen at  
16 the top of the page.

17 A. "Karen, I just received the e-mail below (and  
18 attached file) from Jarden. It looks like they are saying  
19 the brand (Grill Master) is not available until January 1st,  
20 2013. I will follow up with them to understand this better,  
21 but wanted to share this inputs with you. Thanks, Erick."

22 Q. So Walmart was trying to obtain a license for Grill  
23 Master for this project; is that correct?

24 A. We were looking at a lot of names and Grill Master  
25 would have been one of them.

1           Q.     So Walmart was willing to pay a license for Grill  
2 Master in this category, correct?

3           A.     Once again, we were looking at a lot of names to  
4 explore and figure out what options were available to us.

5           Q.     But Walmart would have been willing to pay for a  
6 license for the name for this product, correct?

7           A.     I don't know. I think what we would do is look at  
8 all the names that are available and understand what exactly  
9 is available to us at what degree and make some decisions  
10 from there.

11          Q.     But Grill Master wouldn't have given Walmart a  
12 license for free, would they?

13               THE COURT: You have asked him three or four or  
14 five times. He's not going to tell you that so go to  
15 something else.

16               MS. TRIMMER: Yes, your Honor.

17          Q.     (By Ms. Trimmer) So then I believe we heard  
18 testimony yesterday that Grill Works would have been  
19 Walmart's second choice; is that correct?

20          A.     Five, six years ago I know there was a name given.  
21 Grill Works could have been one. Grill Master could have  
22 been another. I know there was a list of names that we  
23 provided and that others looked at. I don't have the exact  
24 list of names that we came up with, but if you're saying  
25 that's what was on the paperwork, sure.

1 Q. I'll ask you to turn to Exhibit 72, please.

2 MS. TRIMMER: And, your Honor, I would move to  
3 admit Exhibit 80(A).

4 THE COURT: Received.

5 **(Plaintiff's Exhibit No. 80(A) received into evidence)**

6 Q. (By Ms. Trimmer) Could you identify this document  
7 for the jury?

8 A. It's an e-mail from -- at the time the buyer, which  
9 was Joe Delia, to MiKaela Wardlaw Lemmon and myself about  
10 grill brand names.

11 Q. If you could turn to the second page, the top of  
12 the page there's an e-mail from Joe Delia to MiKaela and  
13 yourself. If you could just read that last sentence in that  
14 e-mail.

15 A. The last sentence?

16 Q. Starting with, "Should we."

17 A. "Should we also look at Real Flavor, question mark.  
18 We own the name and use it on our chips/chunks."

19 Q. So Walmart already owned a trademark that it was  
20 using in this category, correct?

21 A. Yes.

22 Q. And Walmart could have used Grill Flavor for the  
23 private label program, correct?

24 A. We were using it in one of the subcategories and,  
25 yes, we could have looked at using it in others.

1 Q. Turning back to the first page of the e-mail,  
2 Backyard Grill is not on this list of potential names, is it?

3 A. It is not.

4 Q. What is the date of this e-mail?

5 A. December 30th, 2010.

6 Q. And Backyard Barbecue is on this list of names,  
7 correct?

8 A. It is.

9 MS. TRIMMER: Your Honor, I would move to admit  
10 Exhibit P-72.

11 THE COURT: It's received.

12 **(Plaintiff's Exhibit No. P-72 received into evidence)**

13 Q. (By Ms. Trimmer) Now, if you could look at  
14 Exhibit 23 in your book. Could you please identify this  
15 document for the jury?

16 A. It's an e-mail from me to my boss, Deanna Baker, at  
17 the time.

18 Q. And could you please read the first paragraph.

19 A. "Spoke with Erick and the name for private label in  
20 grill shop looks to be Backyard Barbecue. I endorse the name  
21 understanding what is available to us."

22 Q. And you said Deanah was your boss at the time,  
23 correct?

24 A. Correct.

25 Q. So you were endorsing the name Backyard Barbecue;

1 is that correct?

2 A. I was.

3 Q. Can you please turn --

4 MS. TRIMMER: Your Honor, I would move to admit  
5 Exhibit P-23.

6 THE COURT: Received.

7 **(Plaintiff's Exhibit No. P-23 received into evidence)**

8 Q. (By Ms. Trimmer) Can you please turn to  
9 Exhibit 24, P-24. Can you identify this document, please?

10 A. It's an e-mail from the buyer at the time, Joe  
11 Delia, to Karen Dineen. Grill study summary.

12 Q. And then the e-mail at the very bottom of the page?

13 A. It's an e-mail from Deanah to myself. Copied or  
14 cc'd would be Erick, Maria and Joe Delia.

15 Q. And what's the date of that e-mail?

16 A. February 23rd, 2011.

17 Q. And again, Deanah was your direct report, correct?

18 A. Deanah was my supervisor.

19 Q. And can you please read what Deanah said to you in  
20 that e-mail.

21 A. "Marvin, based on the study, Backyard Barbecue is  
22 really the only option to us. I think the informality of the  
23 name actually fits our customer and price point positioning  
24 well. As long as we believe it will work for private label  
25 charcoal, I'm on board."

1           Q.     So your direct report thinks the informality of the  
2 name is a good fit for Walmart's customer and price point; is  
3 that correct?

4           A.     She was my direct supervisor.

5           Q.     I'm sorry. So your direct supervisor thinks that  
6 the informality of the name fits Walmart's customer and the  
7 price point for the category, correct?

8           A.     As long as it also would work for the private label  
9 charcoal as well.

10          Q.     So that's a yes?

11          A.     Yes, as long as it also works for the private label  
12 charcoal.

13          Q.     Thank you.

14                 MS. TRIMMER: Your Honor, I would move to admit  
15 Exhibit P-24, please.

16                 THE COURT: It's received.

17                 **(Plaintiff's Exhibit No. P-24 received into evidence)**

18          Q.     (By Ms. Trimmer) And can you please turn to  
19 Exhibit 75. Can you please identify this document.

20          A.     It's an e-mail from Joe Delia, the buyer, to Karen  
21 Dineen, who works on our brand team.

22          Q.     And then the e-mail just below that?

23          A.     That is from Erick Moreira to -- who works on the  
24 brand team -- to myself and Joe Delia, who was the buyer at  
25 that time.

1 Q. What is the date of that e-mail?

2 A. March 11, 2011.

3 Q. And part of this e-mail is redacted, but if you  
4 could read the first full paragraph starting with, "The only  
5 name available."

6 A. "The only name available is Backyard Grill. In  
7 general, I feel good about this name. I am now reaching out  
8 to our customer insights team to understand how to test and  
9 validate this name from a customer perspective."

10 Keep going?

11 Q. No, that's fine. Thank you.

12 So in the last e-mail on February 23rd, Backyard  
13 Barbecue was the only option, correct?

14 A. Yes.

15 Q. And now three weeks later on March 11, he's saying  
16 Backyard Grill is the only name available, correct?

17 A. Correct.

18 Q. And Backyard Grill wasn't on either of the first  
19 two customer insight surveys, was it?

20 A. Not on that e-mail.

21 Q. But Walmart conducted a third consumer survey to  
22 validate the name Backyard Grill, correct?

23 A. I would imagine, yes.

24 Q. And Backyard Grill fared the same as Backyard  
25 Barbecue in the third consumer survey, correct?



1           A.     They were on equal footing.

2           Q.     And according to your testimony, the Backyard Grill  
3 brand had no value, but Walmart obviously put in a lot of  
4 effort to develop a new name, correct?

5           A.     We developed an effort to put in an entry price  
6 point private label program to lower the cost and de-clutter  
7 the space. The naming was an organizing principle for us.

8           Q.     And this e-mail is in March, which is four months  
9 after the program started, and you're still just working on  
10 the name; is that correct?

11          A.     The program was not in the stores until October.  
12 This is prior to that.

13          Q.     But as far as when you initiated the request on the  
14 name for the private grill brand, this was four months after  
15 that request, correct?

16          A.     Correct.

17          Q.     Now, according to your testimony Backyard Grill  
18 brand had no value, but Walmart had several marketing and  
19 legal professionals working on this project, correct?

20          A.     We had our teams working to bring it to life, yes.

21          Q.     And according to your testimony Backyard Grill  
22 brand had no value, but you had three consumer insight  
23 surveys conducted on the name alone, correct?

24          A.     We did.

25          Q.     And according to your testimony the Backyard Grill

1 brand had no value, but you had multiple legal searches  
2 conducted on the name, correct?

3 A. On various names, yes.

4 Q. And according to your testimony the Backyard Grill  
5 brand had no value, but your boss said it resonated -- I'm  
6 sorry -- your direct supervisor said it resonated with  
7 Walmart's customers, correct?

8 A. Say the question again.

9 Q. According to your testimony the Backyard Grill  
10 brand had no value, but your direct supervisor said that it  
11 resonated with Walmart's customers, correct?

12 A. Yes, as long as -- with the caveat as long as it  
13 fits within the charcoal subcategory.

14 Q. Now, according to your testimony the Backyard Grill  
15 brand had no value, but Walmart filed a trademark application  
16 for the mark, correct?

17 A. I would assume that's -- we did apply for a  
18 trademark, yes.

19 Q. And you would consider Walmart to be an efficiently  
20 run company, correct?

21 A. Yes.

22 Q. And at the time that you oversaw the outdoor  
23 entertaining category, you would have considered that to be  
24 an efficiently run category, correct?

25 A. Yes.

1           Q.     And it was during this vetting process through  
2 consumer and legal research that you learned of Variety's  
3 registration for The Backyard; is that correct?

4           A.     We would not have known about Variety's  
5 registration when we were going through these initial names.

6           Q.     I believe you testified earlier that you learned of  
7 Variety's trademark registration during the process of coming  
8 up with the names, correct?

9           A.     I testified to that?

10          Q.     I believe that was your testimony. Is that not  
11 correct?

12          A.     That I knew of -- I learned of Variety's claim  
13 after the items were launched.

14          Q.     But you knew of Variety's trademark registration in  
15 The Backyard as of the time that this process was going on;  
16 is that correct?

17          A.     At the time that we launched the program, I was not  
18 aware of Variety stores or Roses stores at that time.

19                 THE COURT: Is this it for your cross, are you  
20 finished?

21                 MS. TRIMMER: Just a couple more questions, your  
22 Honor.

23                 THE COURT: Let's make it effective and be done  
24 with it.

25                 (Attorney Trimmer conferring with Attorney Adams at counsel

1 table off the record)

2 Q. (By Ms. Trimmer) You didn't do anything to  
3 determine how Variety was using the trademark, correct?

4 A. Did I do anything? I didn't know about Variety  
5 when we were initially looking at this.

6 Q. And you testified that Walmart actually did visit  
7 other competitors though, correct?

8 A. Yes. They're in the book of who was on the  
9 competitive landscape.

10 Q. And we heard testimony from Ms. Dineen yesterday  
11 that Walmart can't really rule anyone out as a competitor,  
12 correct?

13 A. I wasn't here for Karen's testimony. I don't know  
14 what she said.

15 MS. TRIMMER: I have no further questions, your  
16 Honor.

17 THE COURT: Is that it?

18 MS. GARKO: Just one question, your Honor.

19 THE COURT: Please, I mean.

20 MS. GARKO: Just one.

21 THE COURT: Okay.

22 **REDIRECT EXAMINATION**

23 BY MS. GARKO:

24 Q. Mr. Deshommes, if it is the case that your consumer  
25 research showed that the name wasn't going to be the reason

1 people were buying the product, why did you go through the  
2 exercise of trying to figure out what name you should be  
3 using?

4 A. We wanted a name that was going to resonate with  
5 the category and subsequently we wanted --

6 THE COURT: You didn't want the name to be a  
7 negative force.

8 THE WITNESS: Correct.

9 THE COURT: You wanted it to be neutral.

10 THE WITNESS: Correct.

11 THE COURT: You could pick a bad name.

12 THE WITNESS: We didn't want to do that.

13 THE COURT: Right. So no name is better than a bad  
14 name.

15 THE WITNESS: Correct.

16 THE COURT: Okay. Anything else?

17 MS. GARKO: No, your Honor.

18 THE COURT: Thank you. You can step down.

19 MS. TRIMMER: Your Honor, if I could move into  
20 evidence P-75.

21 THE COURT: It will be received.

22 **(Plaintiff's Exhibit No. P-75 received into evidence)**

23 THE COURT: Do you have any other witnesses?

24 MS. GARKO: Yes, your Honor. We call Mr. Robert  
25 Puglisi.

1               Sorry, your Honor. We're retrieving the witness  
2 outside the door.

3               THE CLERK: Raise your right hand.

4                               **ROBERT PUGLISI**

5               having been duly sworn, testified as follows:

6               THE WITNESS: I do.

7               MS. GARKO: Your Honor, may I please distribute  
8 examination binders?

9                               **DIRECT EXAMINATION**

10              BY MS. GARKO:

11              Q.     Good morning. Could you please introduce yourself  
12 to the jury.

13              A.     My name is Robert Puglisi.

14              Q.     What is your occupation, Mr. Puglisi?

15              A.     I'm a private investigator.

16              Q.     How long have you worked as a private investigator?

17              A.     Over 30 years.

18              Q.     Are you employed by an investigation firm?

19              A.     Yes. Company name is MMCA Group, and I'm the  
20 company president.

21              Q.     You're the president?

22              A.     Yes.

23              Q.     Were you retained by counsel for Walmart in this  
24 case to do an investigation?

25              A.     Yes.

1 Q. What were you asked to do?

2 A. I was asked to find and identify any use of the  
3 name Backyard for outdoor grills and grilling accessories in  
4 the marketplace.

5 Q. Were you asked to do anything else?

6 A. I was asked to collect information, pricing,  
7 advertising, things like that, and also specifically a  
8 specimen of use of any barbecue grill or barbecue-related  
9 item.

10 Q. You said you were asked to collect a specimen.  
11 What do you mean by a specimen?

12 A. To make a purchase of a product that bore the name  
13 on it.

14 Q. And this work was done in connection with Variety's  
15 case against Walmart; is that right?

16 A. Yes.

17 Q. During what time period did you conduct your  
18 investigation?

19 A. I began in March of 2013 and through sometime in  
20 May of 2015.

21 Q. And during that time period how many other uses of  
22 Backyard did you find as part of a brand, product name,  
23 company name, product line in connection with the advertising  
24 and sale of grills or grilling accessories?

25 A. Over a dozen.

1           Q.     What did you do, Mr. Puglisi, to investigate the  
2 use of Backyard on grills and grill-related products?

3           A.     Well, initially we were told to find this  
4 information on materials, so we conducted some Internet  
5 research, and I put together a search query using the name  
6 Backyard and Grill and sometimes with qualifiers in the key  
7 words, things like Barbecue or the acronym BBQ, things like  
8 that.

9           Q.     What else did you do?

10          A.     We also conducted telephone follow-ups when we  
11 found something. When I found a particular item, I would  
12 call either a retail store or a distributor to determine if  
13 the product was available and how they were selling it.

14          Q.     I think you said you found over a dozen uses; is  
15 that right?

16          A.     Yes.

17          Q.     And did you compile a demonstrative to show the  
18 jury the uses you found?

19          A.     Yes.

20                 MS. GARKO: Your Honor, may I approach the easel?

21                 THE COURT: Yes.

22          Q.     (By Ms. Garko) Do you see that, Mr. Puglisi?

23          A.     Yes.

24          Q.     Is that the demonstrative you prepared?

25          A.     Yes.



1 Q. And it illustrates the 12 different uses that you  
2 found during your investigation?

3 A. Yes, it does.

4 Q. During the course of your investigation were you  
5 able to obtain any products?

6 A. Products?

7 Q. Physical products.

8 A. Yes.

9 Q. What did you -- what were you able to get?

10 A. We through this research identified a product for  
11 sale in Mississippi that's referred to as The Backyard  
12 Traditions barbecue smoker and it was located at a store,  
13 Fred's Super Dollar Store, on Highway 82 East in Greenwood,  
14 Mississippi, and the purchase was made of the product at that  
15 time.

16 Q. Do you have that smoker here for the jury to see?

17 A. Yes.

18 MS. GARKO: Your Honor, if I may.

19 THE COURT: Yeah.

20 (Attorney Garko displaying item in front of the jury box)

21 Q. (By Ms. Garko) Mr. Puglisi, is this the smoker  
22 that you were able to buy?

23 A. Yes, it is.

24 Q. And I just want to be clear, you said you bought  
25 this at Fred's Super Dollar Store?

1           A.     Fred's Super Dollar Store, yes.

2           Q.     And when was that?

3           A.     Date of purchase was April 11, 2014.

4                   MS. GARKO: I apologize, your Honor. We have the  
5 wrong side. May I turn it around?

6                   THE COURT: Yes.

7           Q.     (By Ms. Garko) I think there's a sticker. I'm  
8 sorry. So you bought that at Fred's in April of 2014?

9           A.     Yes.

10          Q.     How do you know that you bought it then?

11          A.     Well, we have a purchase receipt and the product  
12 was obtained, and I entered the product into our digital  
13 database and I've checked facsimiles of the receipt to know  
14 that's the correct date.

15          Q.     And you're certain that you were able to buy a  
16 Backyard Tradition smoker at Fred's Super Dollar in April of  
17 2014?

18          A.     Yes.

19          Q.     Let's look at what else you found. There's a  
20 binder in front of you, Mr. Puglisi. Do you have that?

21          A.     Um-hum.

22          Q.     Could you please turn to what's been marked as  
23 Exhibit D-89.

24          A.     Okay.

25          Q.     Do you see that?

1           A.     Yes.

2           Q.     Can you explain to the jury what that document is.

3           A.     This is a collection of the assorted promotional  
4 material and advertising and other items that was collected  
5 in the Internet research for The Backyard barbecue grills.

6           Q.     First, I would like to direct your attention to  
7 pages 1 through 10 of Exhibit D-89. What's shown there?

8           A.     The first page is a photograph of that particular  
9 Backyard Traditions charcoal smoker, and the subsequent pages  
10 are captures of web -- from a website that led us to this  
11 particular Backyard Traditions charcoal smoker.

12          Q.     What do the web pages show?

13          A.     Well, this web page is described, it's called  
14 smokingmeatforums.com. So they talk about grilling and other  
15 equipment that's used in grilling, things like that. And  
16 this particular entry was from a blog poster that indicated  
17 that Fred's Super Dollar Stores in Greenwood, Mississippi,  
18 and elsewhere had this Backyard Traditions smoker for sale.

19          Q.     When was that blog post dated from?

20          A.     The blog post reflects that it's dated October 14,  
21 2013.

22          Q.     And when did you capture that blog post?

23          A.     April 4, 2014.

24          Q.     And this is discussing that same Backyard Tradition  
25 smoker that you bought at Fred's?

1           A.     Yes, and it shows photographs of the disassembled  
2 product and construction material, things like that.

3           Q.     Would you now please look at pages 11 through 14 of  
4 Exhibit D-89. What's shown there?

5           A.     First pages are a copy of a newsletter that's  
6 referred to as Backyard Chef Newsletter and it's produced by  
7 a company that's called the Hardware Hank retail store, and  
8 they sell hardware and things, but one of their particular  
9 tabs, if you will, on their Internet was a backyard chef  
10 section and it offered you tips and newsletters for different  
11 items, how to grill things and different recipes.

12          Q.     In addition to the newsletter, was there anything  
13 else on the Hardware Hank website?

14          A.     Yes. There was a reference to The Backyard Chef  
15 10-piece barbecue toolset that is sold at the Hardware Hank  
16 retail stores.

17          Q.     That's what's on the screen here and then the  
18 second one on the demonstrative?

19          A.     Correct.

20          Q.     And did you do anything to confirm whether Hardware  
21 Hank was actually selling these products?

22          A.     Yes. I made a phone call to a Hardware Hank retail  
23 store in Rapid City, South Dakota, and they confirmed that  
24 the product was available as depicted here.

25          Q.     Did you do anything more recently to confirm

1 whether Hardware Hank still had these materials on their  
2 website?

3 A. This week I actually went back to the same Hardware  
4 Hank website and they had the same exact newsletter, The  
5 Backyard Chef Newsletter from the same era on their website  
6 through the same tab that says Backyard Chef.

7 I also contacted a Hardware Hank facility in Rapid  
8 City and asked about this particular product and it's  
9 currently still for sale. I found it through Amazon sold by  
10 a distributor named Supreme Electronics in -- they're located  
11 in Mississippi.

12 Q. So the same Backyard Chef toolset is available for  
13 sale on Amazon?

14 A. Yes.

15 Q. Could you please turn to exhibit -- I'm sorry -- to  
16 page 15 of Exhibit D-89. What's shown there?

17 A. This is a capture of a web page from a company  
18 called GroomStand. They provide gift products for people who  
19 are in weddings. And at the time I identified a particular  
20 item that was referred to as the engraved 3-piece Backyard  
21 BBQ grill set. It's a set of tools and a case for that that  
22 you can give to the groomsmen.

23 Q. Did you do anything to confirm whether this was  
24 actually available for sale at the time?

25 A. At the time I went through the website, added this

1 particular product to the purchase cart. Once we saw it was  
2 going to be available to buy we nullified the sale.

3 Q. Could you please turn to pages 16 and 17 of Exhibit  
4 D-89. What do those pages show?

5 A. This is a capture from a website that's run by a  
6 company called The Backyard Kitchen. And they sell all types  
7 of barbecue grills, smokers and accessories for the same.

8 Q. And were these products actually offered for sale  
9 when you conducted your research and investigation?

10 A. Yes.

11 Q. And did you do anything to confirm that?

12 A. Yes. These -- I made contact with the company by  
13 telephone, The Backyard Kitchen, and I asked about a  
14 particular product that's on this page and they confirmed  
15 they're still in business and that they still are selling the  
16 product at the time.

17 Q. So they're still in business and selling them  
18 currently?

19 A. Yes. I've made a subsequent call this week to the  
20 same company and found out the message on the machine is  
21 still The Backyard Kitchen and the website still has these  
22 products.

23 Q. So it was available --

24 THE COURT REPORTER: Could you repeat the question,  
25 please.

1           Q.     (By Ms. Garko)   So these products were available  
2 both at the time of your original research and now?

3           A.     Yes.

4           Q.     Could you please turn to page 18 of Exhibit D-89.  
5 What's shown there?

6           A.     This is a copy of a web page for a company known as  
7 Brinkmann, and what's depicted is The Backyard Kitchen  
8 heavy-duty single-burner grill that was available for sale at  
9 the time.

10          Q.     Did you do anything to confirm that it was actually  
11 available for sale?

12          A.     Yes.   This particular item is sold through a lot of  
13 different retail distributors, and at the time I contacted  
14 the Home Depot in my area and asked about this product and it  
15 was available for sale.

16          Q.     The Home Depot you just referred to, is that the  
17 big national chain Home Depot?

18          A.     Yes.

19          Q.     And they were selling this Backyard Kitchen  
20 heavy-duty single-burner grill at the time?

21          A.     Yes.

22          Q.     Now, let's look at pages 19 through 20 of Exhibit  
23 D-89.   Just let's go back for one minute.   I apologize.   The  
24 previous page.

25                 Over on the right-hand side where it shows the

1 grill, there's a reference there that says it's not currently  
2 available for sale. Did you do anything to see if that was  
3 right or wrong?

4 A. You could not buy that particular product through  
5 that website, but it was being distributed through other  
6 third parties and Home Depot was one of them that had it.

7 Q. So it wasn't for sale on the website, but it was  
8 for sale through Home Depot?

9 A. Correct.

10 Q. Let's go back to pages 19 and 20, please. What do  
11 these pages show?

12 A. This is a capture from a website for a company that  
13 called itself Mr. Bar-B-Q, and they were selling at the time  
14 grill covers under the name Backyard Basics.

15 Q. And did you do anything to confirm whether this Mr.  
16 Bar-B-Q site was actually selling these Backyard Basic grill  
17 covers?

18 A. Yes. At the time they put the large grill cover  
19 product in my cart online as if I was going to make a  
20 purchase, and once it went through and was going to take my  
21 payment information we nullified the sale.

22 Q. Do you know if Mr. Bar-B-Q still offers these  
23 Backyard Basics grill covers?

24 A. Yes. Recently this week again I checked the  
25 website. It's still available for sale as is depicted, and I



1 made telephone contact with their customer service people and  
2 asked specifically about the large grill cover and a kettle  
3 cover under The Backyard Basics name and they said it's still  
4 available for sale.

5 Q. Let's turn to pages 24 and 25 of Exhibit D-89.  
6 What do these pages show?

7 A. This is a web capture from a company known as  
8 backyardfeeds.com, and they provide various lawn and garden  
9 items and products as well as seasonally outdoor grilling  
10 items.

11 Q. Where was Backyard Feeds located?

12 A. They were located in Leland, North Carolina.

13 Q. North Carolina?

14 A. Yes.

15 Q. What products were offered for sale here in  
16 connection with grills and grilling accessories?

17 A. In addition to a lot of other products they had  
18 kettles, barbecue and charcoal grills. Charcoal, charcoal  
19 grill accessories, things like that.

20 Q. Did you do anything to confirm they actually sold  
21 these?

22 A. Yes. At the time this was the -- I made a phone  
23 call to this company and they confirmed that they had the  
24 various grills available for sale.

25 Q. If you can now please look at pages 26 through 28

1 of Exhibit D-89. What's shown there?

2 A. This is a capture from a web page referred to as  
3 The Backyard Gardener, and they are a company that provides  
4 lots of different things for lawn and garden and landscaping  
5 in addition to selling -- at the time selling products  
6 related to barbecue grills.

7 Q. Did you do anything to confirm that they were  
8 actually offering for sale these grill-related products?

9 A. Yes. This is one where I went through the -- at  
10 the time their website and placed an order for one of the  
11 grill covers that you see depicted here, put it in my cart.  
12 Once it said it was available for sale I nullified the sale.

13 Q. Let's now please look at pages 29 through 38 of  
14 Exhibit D-89. What do those pages show?

15 A. This is a capture of a website from a company known  
16 as backyardcity.com, and they primarily sell charcoal,  
17 barbecue grills and smokers.

18 Q. Did you do anything to confirm that those products  
19 were actually for sale?

20 A. Yes. At the time I made telephone contact with the  
21 company and asked about a specific product that's located in  
22 one of these pages.

23 Q. If you look at page 33, what product is being  
24 offered there?

25 A. The top of that page it says it's the Medina River

1 Backyard Bar B Q smoker. That's the product that I called  
2 about and confirmed it was available for sale at the time.

3 Q. This is from Backyard City?

4 A. Correct.

5 Q. Did you do anything to confirm whether Backyard  
6 City is still offering these products for sale?

7 A. I made a phone call to that company as well very  
8 recently and they are still in business as Backyard City.

9 Q. Lastly for Exhibit D-89, can you please turn to  
10 page 41. What's shown there?

11 A. This is a capture of a web page from a company that  
12 calls itself The Backyard BBQ Grill Company.

13 Q. And what were they offering for sale?

14 A. They offer grill cleaning services and then they  
15 have custom outdoor grill covers, furniture covers, things  
16 like that.

17 Q. Did you do anything to confirm that these products  
18 are actually offered for sale?

19 A. Yes. At the time I contacted their phone number  
20 and asked about a particular custom grill cover and they  
21 confirmed they had those available.

22 Q. Have you done anything more recently to confirm  
23 whether they're still selling those products?

24 A. Yes. This week I called the phone number for this  
25 company in St. Louis, Missouri, and they are still operating

1 as The Backyard BBQ Grill Company.

2 MS. GARKO: We move Exhibit D-89 into evidence.

3 THE COURT: It will be received.

4 **(Defendant's Exhibit No. D-89 received into evidence)**

5 Q. (By Ms. Garko) Now, Mr. Puglisi, can you turn to  
6 Exhibit D-90 in your binder. What is Exhibit D-90?

7 A. Okay. Aside from the first two pages that look  
8 like they're from the United States Patent Trademark Office.

9 Q. Yes, I apologize. Let's start on page 3 of that  
10 exhibit.

11 A. This is a copy of a catalog from a company known as  
12 Klose Barbecue Pits from Texas.

13 Q. And what is Klose Barbecue?

14 A. It's a company that makes custom sort of barbecue  
15 smokers, grills, various products at all different price  
16 ranges.

17 Q. Where did you find these marketing materials?

18 A. This company showed up in our initial Internet  
19 research as having a product that was referring -- as a grill  
20 product referring to Backyard so we made -- found the company  
21 online and contacted their phone number and spoke to actually  
22 a person, Mr. Klose, who confirmed that these products were  
23 available for sale and to ship anywhere in the U.S., and he  
24 claimed worldwide.

25 Q. With respect to Backyard products, what's available

1 in the Klose catalog?

2 A. Well, on the first pages he had a header for some  
3 of the products, it said they were the favorite backyard  
4 grills and smokers, and then specifically there were two  
5 models that were referred to as the Backyard Chef and the  
6 Backyard Chef Junior.

7 Q. So at the top of the page he's using favorite  
8 backyard grills and smokers to describe the products he's  
9 offering?

10 A. Yes.

11 Q. And then the products he's offering are the  
12 Backyard Chef and the Backyard Chef Junior?

13 A. Yes.

14 Q. Have you done anything more recently to confirm  
15 whether these products are still for sale?

16 A. Yes. This week I contacted the Klose company and I  
17 spoke to a representative, not Mr. Klose this time, and they  
18 confirmed that the Backyard Chef and the Backyard Chef Junior  
19 products are still available for sale.

20 MS. GARKO: Your Honor, we move Exhibit D-90 into  
21 evidence.

22 THE COURT: It will be received.

23 **(Defendant's Exhibit No. D-90 received into evidence)**

24 Q. (By Ms. Garko) Finally, Mr. Puglisi, could you  
25 please look at Exhibit D-91 in your binder. What's it

1 showing here? What's shown in Exhibit D-90 -- I'm sorry,  
2 D-91.

3 A. This is a copy of the web page for the big retail  
4 store Bass Pro Shops and it reflected at the time the --  
5 several products that were available for sale. Smokers that  
6 they sold under various names using "Backyard".

7 Q. I'm sorry, just so I'm clear. This was sold  
8 through Bass Pro Shops, the national retail chain?

9 A. Yes.

10 Q. And they were offering for sale a Backyard smoker?

11 A. Multiple, as you can see, Backyard smokers.

12 Q. When did you first find this?

13 A. This was back in 2013.

14 Q. Did you do anything to confirm whether Bass Pro  
15 Shops was actually selling The Backyard smokers?

16 A. Yes. At the time I contacted the Bass Pro Shop and  
17 made inquiry about a particular one of these classic Backyard  
18 smokers and they said they were available for  
19 shipped-to-store delivery.

20 Q. Have you done anything more recently to confirm  
21 whether Bass Pro Shops is still selling these?

22 A. This week I contacted the Bass Pro Shop customer  
23 service number and asked about the same products and they  
24 said that the Classic Backyard Smoker and several others are  
25 available for sale shipped to store.

1           Q.     Mr. Puglisi, these 12 uses we just identified,  
2     those were all identified through the course of your  
3     investigation of looking at Backyard used in connection with  
4     grills and grilling accessories?

5           A.     Yes.

6           MS. GARKO: I have no further questions at this  
7     time, your Honor.

8           THE COURT: All right. We'll take a recess for the  
9     morning at this time and come back with cross.

10                   (Jury out at 10:54 a.m.)

11                   (Recess at 10:54 a.m. to 11:13 a.m.)

12                   (Jury in at 11:13 a.m.)

13           (Robert Puglisi resuming the witness stand at 11:13 a.m.)

14                   (Open Court)

15           THE COURT: All right. Cross.

16           MR. SHAW: Briefly, your Honor. Thank you.

17                   **CROSS-EXAMINATION**

18     BY MR. SHAW:

19           Q.     Mr. Puglisi, you are being paid for your time  
20     today, aren't you?

21           A.     Yes, sir.

22           Q.     Okay. Walmart is paying you?

23           A.     The law firm.

24           Q.     Excuse me?

25           A.     The law firm representing --

1 Q. Walmart's law firm?

2 A. Yes, sir.

3 Q. You testified previously under oath in this case,  
4 correct?

5 A. Yes, sir.

6 Q. In that prior testimony, you indicated that Walmart  
7 had hired you in 2013, correct?

8 A. Yes, sir.

9 Q. Walmart paid you for that work as well?

10 A. Yes, sir.

11 Q. You would agree Walmart is a big company. Very  
12 big?

13 A. Yes.

14 Q. Plenty of money, plenty of resources?

15 A. I suppose.

16 Q. Are you aware that Walmart has showed this jury and  
17 compiled a chart alleging that there is approximately 40  
18 others or more companies using the word "backyard" in the  
19 marketplace; are you aware of that?

20 A. No.

21 Q. Have you reviewed any trademark filings from any  
22 third parties that have tried to register the word  
23 "backyard"?

24 A. I have previously.

25 Q. You have. Do you have any estimate of how many



1 filings those would have been?

2 A. No, not really.

3 Q. You testified previously that your job for Walmart  
4 was to go out and conduct an investigation to provide the  
5 evidence and the proof of third parties in the marketplace  
6 using the word "backyard" on their products, correct?

7 A. Not sure I used those words.

8 Q. Was that in fact your assignment or was it not?

9 A. It defines references to the Backyard name for  
10 grills, companies that sell grills, things like that.

11 Q. It was actually -- you were actually asked by  
12 Walmart to conduct research in the marketplace, marketplace  
13 research, to identify potential uses of Backyard on products,  
14 correct?

15 A. Yes.

16 Q. That was your job in 2013?

17 A. Yes.

18 Q. Okay. That was your only job, correct, that  
19 Walmart hired you for?

20 A. Yes.

21 Q. And part of that assignment, we have here before us  
22 a product that you purchased from a company I believe called  
23 Fred's, correct?

24 A. Fred's Super Dollar, yes.

25 Q. That's the box we have here, the Backyard

1 Traditions?

2 A. Correct.

3 Q. And you brought this box in to show the jury that  
4 as part of your research that you had conducted starting back  
5 in 2013 that Walmart paid you for, here, jury, is a box of  
6 product with Backyard that I purchased. This is what you  
7 brought it for, correct?

8 A. I suppose.

9 Q. Well, other than this product that we have in front  
10 of us, is there any other products you have purchased that  
11 you can show the jury?

12 A. No.

13 Q. When I questioned you previously under oath, I  
14 asked you about any other evidence of actual usage, correct,  
15 of the word "backyard" in the marketplace?

16 A. I don't recall.

17 Q. Isn't it true that I asked you if you had any  
18 potential other contextual information regarding potential  
19 third-party uses of Backyard. Do you recall that testimony?

20 A. I don't recall that, sir.

21 Q. Well, let me ask you today, Mr. Puglisi, do you in  
22 fact have any other evidence, contextual information other  
23 than Fred's to show the jury potential uses of Backyard?

24 A. No, other than this -- specimens or exhibits that  
25 have been entered.

1           Q.     You have no evidence, for example, of any other  
2     single units of a Backyard product that have ever been sold  
3     to anyone, do you?

4           A.     I'm not sure I understand your question, but...

5           Q.     Let's take a look at your exhibit.  Let's start  
6     with Exhibit 89, page 15.  If we can pull that up again.  
7     Here's a product you testified about, right?

8           A.     Correct.

9           Q.     Do you know whether a single unit of this product  
10    was ever sold to anyone?

11          A.     No.

12          Q.     How much does it say this product was for sale for?

13          A.     \$36 plus shipping.

14          Q.     You didn't purchase that product?

15          A.     No, I did not.

16          Q.     Is that because Walmart couldn't afford \$36 or some  
17    other reason?

18          A.     It was not my assignment.

19          Q.     Well, your assignment was to provide proof of use,  
20    was it not?

21          A.     The assignment at that time did not include buying  
22    every product that we saw.

23          Q.     At that time it didn't, but at some point it did  
24    because you have a product here; isn't that true?

25          A.     That's the product -- the product that I purchased,

1     yes.

2           Q.     And you testified today that you've actually gone  
3     back in the past week to do additional research, correct?

4           A.     Yes.

5           Q.     Okay. Well, and you still haven't purchased a  
6     single product, have you?

7           A.     No.

8           Q.     I'm not going to go through each of the exhibits,  
9     but my question is with respect to each of these screen  
10    shots, you don't have any evidence to say whether any of them  
11    were ever actually sold to a single customer, do you?

12          A.     Other than what they portrayed on their commercial  
13    websites.

14          Q.     Well, what about -- let's take a look at another  
15    exhibit for a moment. Let's take a look at page 18. This is  
16    the product that you testified that was not currently  
17    available for sale on that particular website according to  
18    their own language, but you personally went to Home Depot and  
19    saw this product for sale?

20          A.     I called Home Depot.

21          Q.     You called Home Depot to ask if they had a Backyard  
22    Kitchen heavy-duty single-burner grill?

23          A.     That's what I testified to, yes.

24          Q.     Is that what you asked them, or did you ask them if  
25    they had a Brinkmann grill?

1           A.     The product in question has a product number and  
2     it's basically what you ask when you're looking for products.  
3     Either you have the name or you have a product number.

4           Q.     You could have gone to a Home Depot but you just  
5     decided to call them?

6           A.     Correct.

7           Q.     You didn't do any type of historical research, did  
8     you, Mr. Puglisi?

9           A.     I don't think that would be historical at the time,  
10    no.

11          Q.     For example, you wouldn't have tried to research --  
12    you have no way to know what products would have been sold,  
13    for example, in 1993 or 1994 with The Backyard trademark on  
14    it?

15          A.     No. I had no knowledge of that.

16          Q.     At any point in time, in 1998 or 2000, your  
17    research was strictly at the time you were hired, correct?

18          A.     Correct.

19          Q.     And now you have done follow-up research and you  
20    still haven't provided us or the jury with any other evidence  
21    of usage in the marketplace, have you?

22          A.     Other than my testimony, correct.

23          Q.     One final question, Mr. Puglisi. When I looked  
24    through your research and heard your testimony, I couldn't  
25    find evidence of another -- one single other retailer

1 offering a private label product with the word "backyard" as  
2 a brand. Is that fair to say that there is none based on  
3 your research?

4 A. I don't think that's accurate, but --

5 Q. You don't think it's accurate?

6 A. No.

7 Q. So can you identify another retailer that offers a  
8 private label product with a Backyard brand?

9 A. Well, Bass Pro Shop -- I don't know whose product  
10 that is, but Bass Pro Shop had a product that's referred to  
11 as the Backyard.

12 Q. What do you mean you don't know who it is?

13 A. Who the manufacturer is. I don't know if it's  
14 their private label.

15 Q. So you don't know -- your testimony is that you  
16 don't know if that's a Bass label -- private label brand?  
17 Bass Pro Shop private label brand?

18 A. I concur with your statement.

19 Q. And you did not do any follow-up research to  
20 determine whether or not Bass Pro Shops has a private label  
21 brand with the word "backyard," did you?

22 A. No. I only found that they had those particular  
23 products available currently.

24 Q. Okay. So it's fair to say that you don't have any  
25 evidence of another retailer offering a private label brand

1 with the word "backyard," correct?

2 A. I suppose so.

3 Q. Okay. The only two retailers that we're aware of  
4 at least as of today that have a private label brand that  
5 include "backyard" are the two parties in this lawsuit,  
6 correct?

7 A. I can't answer that. I don't know.

8 Q. You don't have any information as to any other  
9 third parties?

10 A. Correct.

11 Q. Okay.

12 MR. SHAW: That's it, your Honor. Thank you.

13 THE COURT: Is that it?

14 MS. GARKO: Two questions.

15 **REDIRECT EXAMINATION**

16 BY ATTORNEY GARKO:

17 Q. Mr. Puglisi, all the 12 that we talked about here  
18 today use Backyard as part of the name we're looking at,  
19 correct?

20 A. Correct.

21 Q. And do you have any reason to believe that all  
22 these products that you looked at, you couldn't have  
23 purchased if you wanted to?

24 A. No, I could have purchased those products at the  
25 time.

1 Q. You believe you could have bought them?

2 A. Yes.

3 MS. GARKO: No more questions, your Honor.

4 THE COURT: All right. You can step down.

5 THE WITNESS: Am I excused, your Honor?

6 THE COURT: Yes.

7 (Witness Excused)

8 THE COURT: Next witness.

9 MR. HOSP: Your Honor, we call Karen Dineen.

10 **KAREN DINEEN**

11 having been duly sworn, testified as follows:

12 THE WITNESS: Yes, I do.

13 MR. HOSP: Your Honor, if I may approach to hand  
14 the witness the binder.

15 THE WITNESS: I need my glasses. Sorry. Can I go  
16 back and get them?

17 **DIRECT EXAMINATION**

18 BY MR. HOSP:

19 Q. Good morning.

20 A. Good morning.

21 Q. Would you introduce yourself to the jury, please.

22 A. Sure. Hi, I'm Karen Dineen.

23 Q. Ms. Dineen, where do you work?

24 A. I work at Walmart.

25 Q. And what do you do?



1           A.     I'm the senior director for our private brands in  
2 general merchandise.

3           Q.     For how long have you worked at Walmart?

4           A.     I've worked at Walmart for a little over 38 years.

5           Q.     38 years ago, what was your first job at Walmart?

6           A.     I started at Walmart in one of our stores as an  
7 assistant manager trainee.

8           Q.     Going back to what it is that you do today, can you  
9 explain to the jury what it is that you do?

10          A.     Sure. As the director for our private brands in  
11 general merchandise, I oversee the process in which we manage  
12 and develop our own brands, our private brands, sometimes  
13 referred to as private label.

14          Q.     And in 2010 what was your job for Walmart?

15          A.     I had a similar job in 2010. I was a senior  
16 director for our private brands, but at that time only for  
17 the home division.

18          Q.     And at that time were grills and outdoor  
19 accessories part of the home division?

20          A.     Yes, they were. At that time indoor and outdoor  
21 home was in one division called the home division.

22          Q.     So were you involved in the process of creating the  
23 Backyard Grill brand?

24          A.     Yes, I was.

25          Q.     And in fact, were you in charge of creating the

1 Backyard Grill brand?

2 A. Yes, I was.

3 Q. Let me ask you Ms. Dineen, when you were going  
4 through the process of creating the Backyard Grill brand,  
5 were you or to your knowledge anyone else at Walmart aware  
6 that Variety Stores used the term Backyard in connection with  
7 grills or grilling accessories?

8 A. No, I wasn't. We weren't.

9 Q. Now going back to the process that you -- well,  
10 we're going to come to the process that you specifically used  
11 with respect to Backyard Grill, but what I would like you to  
12 do is first just explain to the jury a little bit overall the  
13 general process that Walmart goes through when it decides to  
14 create a private label brand.

15 A. Sure. It starts by identifying the products or  
16 maybe groups of related products that we think would be good  
17 for a private brand. The next step does include  
18 brainstorming names that we think would be a good fit, things  
19 that would describe what the customer -- what you could find  
20 within the brand. It's typically a long list. We will  
21 narrow it down as a group to decide what names are the best  
22 fit and --

23 Q. Do you do any consumer research?

24 A. Yes. That's one of the next steps. While we may  
25 understand or think that it's a really good fit, we want to

1 make sure that the customer thinks so as well so we would do  
2 customer research. And also it's important to find out to  
3 make sure the names we're looking at may not have any  
4 negative meanings to anybody at all.

5 Q. Now, you've heard testimony this morning about the  
6 good, better, best product split at Walmart?

7 A. Yes.

8 Q. And I want to focus on that good category, that  
9 lowest price category. When you're thinking about that  
10 lowest price category when Walmart sets out to create a  
11 private label brand, how important is the name to the brand?

12 A. The name itself is not as important when we set out  
13 to do what you heard Marvin talk about, the benefits in  
14 sourcing and pricing that a private name would give us. And  
15 the other big reason is it allows us to be more consistent,  
16 for a more consistent presentation at the shelf, in the  
17 store, and organize information that we know is important to  
18 the customer. So we know it would drive sales to organize  
19 that information consistently and with the right importance  
20 we want to give it across as many suppliers that make it.

21 Q. Now, leaving aside the grilling category, can you  
22 give the jury some examples of sort of descriptive private  
23 label brands that Walmart has used in other categories that  
24 they might have seen?

25 A. Sure. Maybe at Walmart you have seen in toys we

1 have the brand Kid Connection and Play Day. In baby  
2 products, including diapers, we have the brand Parents  
3 Choice. In the pet department we have the brand Special  
4 Kitty for cat food. We have Auto Drive as the brand we use  
5 in the automotive department for car things and car care  
6 items. And we have the name Athletic Works for workout  
7 clothes.

8 Q. All right. Now, I'd like to talk to you  
9 specifically about the branding process that Walmart went  
10 through when it created the Backyard Grill brand. Do you  
11 have an understanding of why Walmart decided to create a  
12 private label in this area?

13 A. Yes, I do.

14 Q. And why was that?

15 A. One of the reasons, we had in the good range of the  
16 quality and price in these products for grills and grills  
17 accessories. We had a lot of different suppliers. We had a  
18 lot of different packaging. We had suppliers that develop  
19 packaging that would call a similar item something different  
20 than another supplier would call a similar item, or they  
21 would put the size, which for some of these products is  
22 important, or other functions in different places on the  
23 packaging. So it was pretty confusing across all of these  
24 different labels and pretty cluttered shopping experience,  
25 and our customers consist of busy families, and when you're

1 shopping for that price level, we just want to make it a  
2 quick and easy experience and it wasn't at that time.

3 Q. So once Walmart decided that it was going to create  
4 a private label brand for the grills and grilling accessories  
5 category, how did you go through that process; can you  
6 describe that a little bit for the jury?

7 A. Sure. So we had identified the categories in  
8 grilling and grilling accessories. The next thing was to  
9 brainstorm a lot of names that may fit. Brainstorming is a  
10 good process, you get some good things and some bad whenever  
11 you brainstorm, so it's a long list.

12 So we have that list of names that could work, and  
13 then one of the next steps is to really narrow it down to the  
14 names that we think are a good fit consistent with the  
15 category that the customer would expect to find the kind of  
16 products that we were going to put in this brand.

17 Q. Do you remember some of the names that were  
18 brainstormed while you were going through this process?

19 A. Some of them, yes. We had Grill Time, Grill Works,  
20 we had Barbecue Master, Backyard Barbecue and Barbecue Basics  
21 I think it was.

22 Q. You mentioned Backyard Barbecue. Was that a name  
23 that was brainstormed and then was sent to research at some  
24 point?

25 A. Yes, it was.

1           Q.     Now, at that point was Walmart aware that Variety  
2     used Backyard Barbecue on its grills and grill accessories?

3           A.     No, we weren't.

4           Q.     At some point during this process of coming up with  
5     a name, did Walmart become aware that Variety used the term  
6     Backyard in any way separate from grills and grilling  
7     accessories?

8           A.     Yes, we did.

9           Q.     What did Walmart become aware of?

10          A.     We became aware that Variety had a mark -- the name  
11     The Backyard registered for lawn and garden equipment  
12     services.

13          Q.     Now, did that registration include any reference to  
14     grills or grilling accessories?

15          A.     No, it did not.

16          Q.     When was the first time that Walmart actually  
17     learned that Variety used Backyard Barbecue on its grills and  
18     grilling accessories?

19          A.     The first time we learned about that was in August  
20     of 2012, and it was the August after the season we had  
21     launched the brand and we had applied for a trademark to  
22     register the Backyard Grill name and our design logo. And  
23     when we went to register the name, Variety filed an  
24     opposition to that at that time, and that's how we learned  
25     that they were using it in conjunction with grills.

1           Q.     When Walmart was going through the naming process,  
2     did it believe that Variety's registration for The Backyard  
3     in connection with lawn and garden sales/services created a  
4     problem for Walmart using the term Backyard Grill in  
5     connection with grills and grilling accessories?

6           MR. ADAMS:   Objection, your Honor.

7           THE COURT:   Overruled.

8           A.     No, we did not.

9           Q.     (By Mr. Hosp) Why not?

10          A.     One, it was a different name.   Two, it was a  
11     different category.

12          THE COURT:   Just a minute.

13          Q.     (By Mr. Hosp) Going through the branding process --

14          THE COURT:   Just a minute.

15          How many stores does Walmart have in America?

16          THE WITNESS:   Over 4,000.

17          THE COURT:   4,000.   And they're spread out in all  
18     50 states?

19          THE WITNESS:   Yes.

20          THE COURT:   Okay.   And this would have been -- this  
21     would apply uniformly throughout all 4,000 stores, this  
22     brand?

23          THE WITNESS:   The brand?   Depends what you mean  
24     uniformly.   We had plans to carry the brand, I think, in the  
25     majority of the stores.   There may be a few exceptions.   The

1 number of items and how much space for this brand would vary  
2 a lot by different store.

3 THE COURT: But you're talking about California,  
4 Oregon, Washington, all the way to Maine and Vermont.

5 THE WITNESS: Yes.

6 THE COURT: Okay. All right. Go ahead.

7 MR. HOSP: Thank you.

8 Q. (By Mr. Hosp) At the time Walmart was going  
9 through the branding process, did it become aware of other  
10 companies using the term "backyard" in connection with other  
11 words on grills and grilling accessories?

12 A. Yes, we did. Quite a few.

13 Q. Can you recall any of those?

14 A. Yes. There was Backyard Gear, Backyard Warrior, I  
15 think Backyard Chef, Backyard Essentials, maybe a Backyard --

16 Q. If you would, turn to Exhibit D-6 in your binder,  
17 please. Can you identify what that document is?

18 A. Yes. These are trademark registrations for names.

19 MR. HOSP: Your Honor, we offer D-6.

20 THE COURT: Received.

21 **(Defendant's Exhibit No. D-6 received into evidence)**

22 Q. (By Mr. Hosp) If you would, turn to page 150 of  
23 this list.

24 A. Okay.

25 Q. And if you could, just tell the jury what name it



1 is that is registered here.

2 A. This name is Backyard World.

3 Q. And are grills or grilling accessories any of the  
4 products that are listed under this registration?

5 A. Yes. This mentions barbecue grills.

6 Q. Who's the owner of this registration?

7 A. This is the Terrier Corporation.

8 Q. To your knowledge, is that company associated at  
9 all with Variety Stores?

10 A. No, not to my knowledge.

11 Q. If you would, turn to page 203 in this exhibit.  
12 Can you just tell the jury what the name is that is  
13 registered under this registration?

14 A. Yes. This one is Backyard City.

15 Q. And are grills or grilling accessories any of the  
16 products that are covered under this registration?

17 A. Yes. This one mentions gas grills.

18 Q. And who's the owner of this registration?

19 A. This is Vimata Interactive.

20 Q. To your knowledge is that company associated at all  
21 with Variety Stores?

22 A. No, not to my knowledge.

23 Q. If you would turn to page 217, please. And tell  
24 the jury what the name is that's registered under this  
25 registration.

1           A.     This name is Backyard Chef.

2           Q.     And are grills or grilling accessories any of the  
3 goods or services that are listed under this?

4           A.     Yes.   This lists barbecue grills, barbecue utensils  
5 and grilling accessories.

6           Q.     Who's the owner of this registration?

7           A.     This is United Hardware Distributing Company.

8           Q.     To your knowledge is that company associated with  
9 Variety Stores?

10          A.     No, not to my knowledge.

11          Q.     If you would, turn to page 220 and tell the jury  
12 what the name is that's registered here.

13          A.     This name is Backyard Basics.

14          Q.     Under grills or grilling accessories, any of the  
15 goods listed under this registration?

16          A.     Yes.   This is for barbecue grill covers.

17          Q.     Who owns this registration?

18          A.     Mr. Bar-B-Q.

19          Q.     To your knowledge is Mr. Bar-B-Q associated at all  
20 with Variety Stores?

21          A.     No, not to my knowledge.

22          Q.     If you will turn to page 322.   Just tell the jury  
23 what name it is that's registered here.

24          A.     This one is Backyard Classic.

25          Q.     And are grills or grilling accessories any of the

1 goods that are covered under this registration?

2 A. Yes. This covers barbecue grills.

3 Q. And who owns this?

4 A. This is the Vendor Development Group.

5 Q. And to your knowledge are they associated at all  
6 with Variety Stores?

7 A. Not to my knowledge.

8 Q. Did you, back in 2011 -- 2010, 2011 do any research  
9 yourself to determine whether or not these products were  
10 actually in the marketplace or did you just look at the  
11 registrations?

12 A. We looked at the registration and my understanding  
13 is the trademarks are live, so to have a live trademark you  
14 have to be using the product.

15 Q. Setting aside the registrations, during the  
16 branding process, did you become aware or did Walmart become  
17 aware that there was another company using Backyard Barbecue  
18 in connection with grills and grilling accessories?

19 A. Yes, we did, at the time we were looking at a name.  
20 It was not Variety, but we did find that there was another  
21 company using Backyard Barbecue.

22 Q. So that was not Variety you said?

23 A. Correct.

24 Q. Let me go back. Before I come back to that, let me  
25 just ask you, with respect to the company's -- the

1 registrations that we just covered, when Walmart launched its  
2 Backyard Grill products, did any of these companies sue  
3 Walmart?

4 A. No, they did not.

5 Q. Did any of these companies send you threatening  
6 letters?

7 A. No.

8 Q. Did any of these companies suggest that there was a  
9 problem with Walmart using Backyard Grill?

10 A. No, they did not.

11 Q. To your knowledge has anyone ever been confused  
12 between Walmart's use of Backyard Grill and any of the  
13 products that are offered by these companies?

14 A. No.

15 Q. Now, back to the third party that used Backyard  
16 Barbecue. At the time that you learned that, what was the  
17 name that Walmart was planning on using for its grills and  
18 grilling accessories?

19 A. At that time we were planning on using the name  
20 Backyard Barbecue.

21 Q. And as a result of finding out that there was  
22 another company that used Backyard Barbecue, did Walmart take  
23 any action?

24 A. Yes, we did. We decided not to go forward with  
25 Backyard Barbecue because another company was using that

1 name.

2 Q. And did you go forward with a different name?

3 A. Yes, we did.

4 Q. What was the different name?

5 A. That was Backyard Grill.

6 Q. Let me ask you, did Walmart believe that there was  
7 a problem going forward with Backyard Grill even knowing  
8 there was another company out there using Backyard Barbecue?

9 A. No, we did not.

10 Q. Why not?

11 A. Because it was a different name and it was a  
12 different name amongst many other names using Backyard with  
13 another name in grills, and those did not seem to be a  
14 problem and there was no one using Grill with Backyard that  
15 we were aware of.

16 Q. Let me ask you something, Ms. Dineen. If Backyard  
17 was such a common term for grills, why would Walmart want to  
18 use a name that included Backyard?

19 A. You're right, it is, as we see, a common name, and  
20 what we wanted in our brands at this good level is a name  
21 that's a good fit with the category so it describes the  
22 products and it also kind of gives the customer an idea of  
23 how they may use it.

24 Q. At the lower price point for grills that you're  
25 talking about, does the name of the grill drive sales?

1 A. No, the name does not.

2 Q. How do you know that?

3 A. We know that from our customer research.

4 Q. I'd like to take a look at some of that research.

5 If you would, turn in your binder to D-206.

6 A. Okay.

7 Q. If you could identify for the jury what this  
8 document is.

9 A. This document is the question and the responses  
10 that was part of our customer research when we were  
11 developing the name.

12 MR. HOSP: Your Honor, we offer D-206.

13 THE COURT: It's received.

14 **(Defendant's Exhibit No. D-206 received into evidence)**

15 Q. (By Mr. Hosp) Now, if you would, turn to the page  
16 that is 776, please.

17 A. Okay.

18 Q. Can you explain to the jury what it is that's shown  
19 here.

20 A. Okay. This shows the question and the responses  
21 that was one -- one of the questions in the survey.

22 Q. Sorry. What was that question?

23 A. And this one specifically asks the people who are  
24 taking the survey, our customers, to imagine you were at  
25 Walmart and need to purchase grilling items such as a grill,

1 grilling accessories or charcoal. Assuming that the cost and  
2 benefits are the same across all brands, please pick which  
3 three you are most likely to purchase based on their name.

4 Q. And can you describe for the jury what you see in  
5 the results here?

6 A. What we found in these results, that there were  
7 only two of the names that registered with a majority of the  
8 respondents that they would choose to buy just based on the  
9 name.

10 Q. And looking at those, can you identify what those  
11 two names are?

12 A. Yes. The two are Grill Master and Weber.

13 Q. And if you look at the percentages of those names  
14 that ranked in the top three answers for the people who took  
15 the survey, what do those numbers tell you?

16 A. Yeah. Grill Master was at 69 percent of the  
17 respondents chose it, Weber was at 67, and those really  
18 indicate the likelihood that the survey results would match  
19 what would really happen like in real life.

20 Q. So at some point did Walmart at least do a  
21 preliminary investigation into whether or not Grill Master  
22 might be available to take a license from?

23 A. Yes, we did.

24 Q. And what happened with that?

25 A. We found out that because of an agreement that

1 Grill Master had with Lowe's, it would not be available to  
2 Walmart.

3 Q. Now, would Walmart potentially have considered  
4 taking a license for Grill Master?

5 A. Potentially, yes, but it may have changed our  
6 positioning for the private brand.

7 Q. What do you mean by that?

8 A. We had set out -- our challenge from the merchants,  
9 Marvin's group at the time, was to develop a private brand at  
10 the good quality and price level and typically, because the  
11 name is not important at that level, we wouldn't pay for a  
12 name. It wouldn't be a valuable -- of value to pay at that  
13 good level when the name is not that important. So I think  
14 if it would have been available --

15 THE COURT: You would be wasting money.

16 THE WITNESS: Exactly. That's what my boss said.

17 THE COURT: You would be wasting money. If you  
18 bought Weber's thing and sold the Weber grill for \$20, you'd  
19 be killing yourself.

20 THE WITNESS: You're right. When you go to the  
21 store there, at that quality level it's about the price and  
22 about what features the item gives you.

23 Q. (By Mr. Hosp) And before you got to any point  
24 where you would seriously consider, what did you learn about  
25 the possibility of taking a license for Grill Master?



1           A.     For Grill Master?

2           Q.     Yes.

3           A.     That it wasn't available because of their agreement  
4 with Lowe's.

5           Q.     Now, looking back toward the document down toward  
6 the bottom, do you see where it says Backyard Grill and  
7 Backyard BBQ?

8           A.     Yes.

9           Q.     What can you tell from those results?

10          A.     From those results, you can tell that both of those  
11 names are not recognizable for these products. The customer  
12 is highly unlikely to buy these based on the name alone.

13          Q.     And looking under the heading rank 1, what  
14 percentage of people who were surveyed chose Backyard Grill  
15 as their favorite name?

16          A.     Only two percent.

17          Q.     And how about for Backyard Barbecue?

18          A.     The same. Only two percent.

19          Q.     What does that tell you, again, about whether or  
20 not these names are names that are likely to drive sales?

21          A.     This would show that they're not likely to drive  
22 sales.

23          Q.     What name did Walmart ultimately decide to use,  
24 which of these, Backyard Grill or Backyard Barbecue?

25          A.     Backyard Grill.

1           Q.     When Walmart decided to use Backyard Grill, did it  
2 go out to any other company to see if it could license  
3 Backyard Grill?

4           A.     No.

5           Q.     Why not?

6           A.     Two reasons. We would not be interested in paying  
7 a license at the good level, and there was also no records of  
8 anybody who used Backyard Grill, which is why we chose it.

9           Q.     Now, I'd like to take a look at one of the ways in  
10 which this research has been used, and I'll show you a  
11 document that's already been entered. The jury has already  
12 seen it. It's D-56 in your binder.

13                  I'll direct you on the first page of this -- next  
14 page -- to a bullet point, the second bullet point at the  
15 top. Mr. Deshommes has already testified to where it says,  
16 "When shopping based on name alone, shoppers migrate toward  
17 well-known recognizable names." Do you see that there?

18          A.     Yes.

19          Q.     Now, based on the 11 percent and two percent  
20 results that we just looked at, can you say whether or not  
21 Backyard Grill and/or Backyard Barbecue would be considered  
22 well-known or recognizable names?

23          A.     Yeah. I could say that they both would not be.

24          Q.     We've been talking a lot about the name for the  
25 brand. When you think about branding, do you think of --

1 brand just meaning the name?

2 A. No, not -- it's a lot more than the name.

3 Q. What else is there to a brand from the way you  
4 think about it?

5 A. Obviously the brand is about the product, the  
6 quality of the product, the -- your whole experience with the  
7 product as you take it home and use it. And then outside of  
8 the product, a lot of it is the store experience at shelf,  
9 and so that relates to the packaging and how we design the  
10 packaging and use the name and use the other information  
11 that's important to put on the packaging.

12 Q. I'd like to talk a little bit about the packaging.  
13 Did Walmart develop the packaging itself?

14 A. No, but we hired a design agency to do so.

15 Q. And did Walmart oversee that process?

16 A. Yes, we did.

17 Q. What was the goal in creating that packaging? What  
18 was the desired message that you wanted to convey?

19 A. Yeah. The goal was to make sure that it was a good  
20 fit with these categories and to make sure that the  
21 information that's important to the customer, which then is  
22 important to drive sales, was clearly communicated.

23 Q. Now, I'd like to direct your attention to Exhibit  
24 D-55 and ask, if you would, to identify what that document  
25 is.

1           A.     Okay. This is the creative style guide for the  
2 packaging for Backyard Grill.

3           MR. HOSP: We offer D-55, your Honor.

4           THE COURT: It will be received.

5           **(Defendant's Exhibit No. D-55 received into evidence)**

6           Q.     (By Mr. Hosp) In terms of brand creation is this  
7 an important document?

8           A.     Yes. Extremely important.

9           Q.     Why is it important?

10          A.     This document is important because we have several  
11 suppliers that supply us with this product and they not only  
12 supply us with the product, but they also develop the  
13 packaging for it. And as I said earlier, we were in a  
14 cluttered space and our goal was to have consistent  
15 packaging, and so once we put this guide together and  
16 identify what's important, how we want the layout, how we  
17 want the customer to see things, it is the best tool we have  
18 to give to all the different suppliers so they produce  
19 consistent packaging for us.

20          Q.     Were you involved in the creation of this document?

21          A.     Yes, I was.

22          Q.     And in fact were you responsible for this document?

23          A.     Yes, I was.

24          Q.     Now, in terms of designing packaging for the -- to  
25 meet the customer's expectation, did Walmart do any research

1 to figure out what the customer's expectations might be?

2 A. Yes. When we set out to develop the packaging, we  
3 will identify our core competitors and go out to the market,  
4 to those stores, to see what the customer is used to seeing  
5 when they buy grills and grilling accessories. And so we  
6 want to make sure we don't deviate from what they're used to  
7 too much, so it's still a good fit with the category, but  
8 also we can see what opportunities we may have to do it  
9 better or to do it more uniquely.

10 Q. Is this a process that you do in connection with  
11 deciding what name to use?

12 A. Oh, no, this is specifically in the development for  
13 the packaging.

14 Q. Okay. What competitors did you go out to look at?

15 A. When we set out to look at packaging we looked at  
16 of course Lowe's and Home Depot, we looked at Target, K-Mart  
17 and Sears, and we also looked at Menard's.

18 Q. And why did you go to those competitors?

19 A. These were competitors that, from the buyers and  
20 from our suppliers, that they found to be doing well in these  
21 categories and would be the ones to look at.

22 Q. Did you go out to visit Variety Stores?

23 A. No, we did not.

24 Q. Why not?

25 A. Because they were not considered to be a key core

1 competitor in this category.

2 Q. And at this point when you did competitive research  
3 for the packaging, were you aware that Variety offered grills  
4 and grilling accessories using Backyard Barbecue?

5 A. No. Not at this point.

6 Q. Now, it's fair to say that if you had gone out to a  
7 Variety store, depending on the season, you might have seen  
8 grills and grilling accessories that used the term Backyard  
9 Barbecue; isn't that right?

10 A. We may have, yes.

11 Q. If you had done that and you had seen that Variety  
12 Stores was offering grills and grilling accessories that used  
13 Backyard Barbecue, would Walmart have decided not to use  
14 Backyard Grill?

15 A. No.

16 Q. Why not?

17 A. Because that was a different name and we had  
18 already found another company that was using Backyard  
19 Grill and decided not to use -- I'm sorry -- another company  
20 that was using Backyard Barbecue and decided to use Backyard  
21 Grill, a different name.

22 Q. Going back to this document, if we could pull up  
23 pages 944 and 945, if we could put those together.

24 Now, I'd like you to take a look at these pages, and  
25 I'd like you to sort of walk through with the jury how the

1 goals of the packaging design in terms of the messaging to  
2 the consumer are carried out in the actual packaging that's  
3 displayed here.

4 A. Okay. In this, our goal was to make sure that the  
5 product description was prominent on the packaging and that  
6 also other key features, like in this case that it's a  
7 22-and-a-half-inch kettle, was key. So we did that by making  
8 sure that the product description used the largest letters,  
9 the size of the letters and actually took up the majority of  
10 the space on the label. The other thing we did to make sure  
11 that was done was we used the colors of red against the black  
12 background, because that made it really pop and made it  
13 really clear.

14 Q. I'd like to compare that to the way the Backyard  
15 Grill logo is done. Before we get to that, let's look at the  
16 Backyard Grill logo. Is it just the words Backyard Grill?

17 A. No. It's the Backyard Grill name and the design.  
18 What we did with the "I" was to replace the "I" with a grill.

19 Q. Okay. And in terms of the presentation here, which  
20 term is emphasized; is it Backyard or is it Grill?

21 A. It's Grill. It's probably about twice the size of  
22 the word Backyard.

23 Q. And comparing the overall logo to the rest of the  
24 packaging, how does that compare in terms of size with the  
25 actual attributes of products?

1           A.     Yeah. The logo is quite smaller, as you can see,  
2     versus the name of the product. And the other thing, in  
3     order to make the product pop, we chose to use Backyard Grill  
4     in gray. So you can read it, but it definitely kind of takes  
5     a back seat to the product name.

6           Q.     I want to go back to the Backyard Grill logo again.  
7     Is there a reason you stylized it in this way with the Grill  
8     image for the "I"?

9           A.     Yeah. We liked creatively how it looked and it was  
10    more creative than just using the words. And also, we knew  
11    that while Backyard Grill was not used, there were so many  
12    Backyard somethings used with Grills and we wanted to have a  
13    design that was more unique and that would also allow us --  
14    because there was a concern that the name was so common that  
15    you may not be able to get a trademark for it. So we wanted  
16    to make sure that when we registered, it was not just the  
17    name, it was the design.

18          Q.     And so did Walmart actually file an application to  
19    register the Backyard Grill and design?

20          A.     Yes, we did.

21          Q.     Ms. Dineen, when did Walmart first start selling  
22    products with the Backyard Grill logo?

23          A.     Backyard Grill was planned to launch in the spring  
24    of 2012. So spring, in a retailer's view, is not always  
25    aligned with the weather, but that would be like in January,



1 February and March of the year 2012. But actually the way  
2 the product flowed in, there was some product that was  
3 received in late 2011, probably between October and December.

4 Q. And when Walmart actually launched the Backyard  
5 Grill products, did it do a big product launch with a huge  
6 announcement and lots of advertising?

7 A. No, we did not.

8 Q. Did it do anything to really sort of try to promote  
9 specifically the Backyard Grill name?

10 A. Not to promote the name, no.

11 Q. And why is that?

12 A. As we have said before, it really wasn't about  
13 promoting the name. The name was not a thing that's  
14 important to the customer at the good quality and price  
15 level.

16 Q. Ms. Dineen, just a couple more questions. When  
17 Walmart launched the Backyard Grill line of products, did it  
18 ever have any intent to trade off of any of Variety's  
19 goodwill?

20 A. No, we did not.

21 Q. Sitting here today, do you believe that the way  
22 Walmart used the Backyard Grill and design name has confused  
23 any consumers at all?

24 A. No.

25 Q. Are you aware of any consumer who has ever been

1 confused?

2 A. No, I'm not aware of any consumers that have been  
3 confused.

4 Q. My last question is based on everything that you  
5 know now, do you believe, as the person who was in charge of  
6 this branding effort, that you were reckless in letting  
7 Walmart launch the Backyard Grill line of products?

8 A. No, I do not.

9 Q. Why not?

10 A. Because we chose a name that was not being used,  
11 Backyard Grill, in a category that was kind of filled with  
12 names that used Backyard with something else and we were sure  
13 to make -- to choose a name that was not being used, the  
14 Backyard Grill.

15 MR. HOSP: Nothing further, your Honor.

16 THE COURT: Do you have any idea roughly of how  
17 many customers Walmart has in America?

18 THE WITNESS: We have the majority of the  
19 population. I don't know the number exactly.

20 THE COURT: The population is like 340 million so  
21 you would have --

22 THE WITNESS: It's at least over 200 million.

23 THE COURT: Is it?

24 THE WITNESS: Yeah. I think we have somewhere  
25 upwards of 100 million people visit our stores every week.

1 THE COURT: Every week?

2 THE WITNESS: Yeah.

3 THE COURT: Okay. Thank you.

4 Do you have any cross?

5 MR. ADAMS: I do, your Honor.

6 **CROSS-EXAMINATION**

7 BY MR. ADAMS:

8 Q. Good afternoon, Ms. Dineen. How are you?

9 A. Good afternoon.

10 Q. We have spoken before, haven't we?

11 A. Yes, a couple times.

12 Q. You testified that Walmart would rather have a name  
13 that was descriptive than a distinctive trademark. You said  
14 that in one of your prior testimonies; is that correct?

15 A. Correct.

16 Q. In all the documents Walmart has produced or  
17 identified to and from many Walmart employees and in your  
18 deposition and other testimony we've heard, I cannot find one  
19 statement contemporaneous with this project you've been  
20 discussing that Walmart wanted a descriptive word as the name  
21 for its grills and accessories; isn't that right?

22 MR. HOSP: Objection. Is that testimony, your  
23 Honor?

24 MR. ADAMS: It's a leading question.

25 THE COURT: Overruled.

1           A.     There may not be a document on it.

2           Q.     (By Mr. Adams) And, in fact, we've just seen a few  
3 moments ago that Walmart's first choice was Grill Master,  
4 which was the second ranked -- second highest ranked mark of  
5 all the ones on that list, correct? And you even went so far  
6 as to contact Grill Master to see if you could acquire the  
7 license, correct?

8           A.     Yes. I think the positioning would have changed.

9           Q.     I haven't seen any documents that Walmart has  
10 produced that indicates such a change in direction. Are you  
11 aware of such documents that we haven't seen?

12          A.     You mean documents if we would have used Grill  
13 Master?

14          Q.     Some document saying, well, Grill Master wasn't  
15 available so let's go to a much lower ranked, much more  
16 descriptive trademark. We've seen nothing like that in any  
17 of the documents produced by Walmart. Why is that, Ms.  
18 Dineen?

19          A.     There are no documents about a shift -- Grill  
20 Master was one of the names, right, and I think a few of the  
21 merchants were intrigued by the name since it was well-known  
22 and we wanted to see if it was available.

23          Q.     Why did Walmart file an application to register  
24 Backyard Grill as a trademark?

25          A.     That is a regular process with our private brands.

1 And it was for the name and the design.

2 Q. Now, one of the other questions I asked you in a  
3 previous session when you were under oath was if there was a  
4 particular reason why Walmart did not go forward with  
5 Backyard Barbecue and you said, quote, after consulting with  
6 legal we decided not to move forward with Backyard BBQ, close  
7 quotes. Did I quote you correctly?

8 A. Sounds like it, yes.

9 Q. But you've never said what that consultation was,  
10 have you?

11 MR. HOSP: Objection, your Honor. He's calling for  
12 privileged --

13 THE COURT: Sustained.

14 MR. HOSP: The witness --

15 A. So could you repeat the question?

16 Q. (By Mr. Adams) I think the objection was sustained  
17 if I heard the Court correctly.

18 A. Okay.

19 Q. But at this point where you have just testified  
20 that you had consulted with legal, the Backyard Barbecue was  
21 the trademark of choice for Walmart, correct?

22 A. At one point during the process, yes, we were --  
23 Backyard Barbecue was the leading name.

24 Q. Right. And you just testified that later Walmart  
25 learned of another trademark for Backyard Barbecue?

1           A.     Yes.

2           Q.     How was that other trademark located?

3           A.     It was with the Trademark Office.

4           Q.     Are you saying there was a trademark application  
5 for Backyard Barbecue?

6           A.     We found out that Backyard Barbecue was used by  
7 another company.

8           Q.     You say in the Trademark Office?

9           A.     I believe so.

10          Q.     You're saying there was a trademark application or  
11 a registration for Backyard Barbecue?

12          A.     I believe that's how we found out.

13          Q.     Has that registration ever been shown to the jury  
14 or even, for that matter, furnished to Variety?

15          A.     I'm not aware. I'm not sure.

16                 MR. ADAMS: Your Honor, I can represent that we're  
17 not aware, in all the documents that have been produced in  
18 this litigation, that there is either a pending trademark  
19 application or a registration for Backyard Barbecue and this  
20 is a question that needs to be addressed and resolved now.

21                 THE COURT: You're telling me that?

22                 MR. ADAMS: I am.

23                 THE COURT: I make the decision what we --

24                 MR. ADAMS: Well, I'm submitting that to the Court.

25                 THE COURT: Yeah, thanks for your help.

1 MR. ADAMS: Something should be done. And we're  
2 asking the Court's assistance in that.

3 THE COURT: I don't see the issue. Backyard  
4 Barbecue isn't what -- what's your question?

5 MR. ADAMS: Let me continue my questioning in just  
6 a moment.

7 THE COURT: I'm going to tell you to just continue  
8 your cross-examination. I'm not going to hear any motions  
9 from you right now at all.

10 MR. ADAMS: All right. Thank you, your Honor.

11 THE COURT: You got cross? If you're finished with  
12 cross, then you can give it up.

13 Q. (By Mr. Adams) Referring to this trademark  
14 Backyard Barbecue, I just want to clarify, it's your  
15 understanding that there was a trademark application or  
16 registration for Backyard Barbecue; is that correct?

17 A. Yeah. We were made aware that Backyard Barbecue  
18 was being used by another company.

19 Q. And who made you aware of that fact?

20 A. Through our legal department.

21 Q. Was this Backyard Barbecue registration being used  
22 on grills?

23 A. Yes, I believe so.

24 Q. What kind of grills?

25 A. I'm not sure what kind.

1 Q. Who was the name of the company?

2 A. I don't know.

3 Q. Did you ever know the name of the company?

4 A. No.

5 Q. Did you ever contact the company to see if the mark  
6 was still in use?

7 A. No. We just decided not to go forward with the  
8 name.

9 Q. So you never contacted the company at all?

10 A. No. We decided -- once we found out that it was  
11 being used, we went a different route. We did not use the  
12 name Backyard Barbecue.

13 Q. Do you know how long this Backyard Barbecue  
14 trademark had been in use?

15 A. No, I don't.

16 Q. Do you know whether it was still in use at the time  
17 you learned about it?

18 A. I would imagine it was still in use, otherwise we  
19 wouldn't have been given that information.

20 Q. What type of information did you get that  
21 determined or told you that it was still in use?

22 MR. HOSP: I just -- your Honor, the witness can  
23 testify to facts that were --

24 THE COURT: Are you going to make a speech or are  
25 you going to object to something?



1 MR. HOSP: Objection, your Honor.

2 THE COURT: Sustained.

3 MR. HOSP: Thank you.

4 Q. (By Mr. Adams) Do you know whether or not this  
5 Backyard Barbecue usage has been in use when Roses filed its  
6 application in 1993?

7 A. No.

8 Q. So you did no research at all to determine whether  
9 this application for Backyard Barbecue had ever been used?

10 A. No. Once we got the information that it was being  
11 used, we stopped discussing that name and didn't spend any  
12 more time on that name. We went a different way.

13 Q. That could have been by Variety, could it not have?

14 A. Potentially.

15 Q. Do you recall testifying in your deposition that  
16 the brand team working on the grill project identified  
17 Target, Home Depot, Lowe's and maybe some other companies  
18 that you couldn't recall as being major competitors but not  
19 Variety?

20 A. Yes, I do.

21 Q. Now, isn't it true that all these companies you  
22 mentioned -- Target, Home Depot, Lowe's and maybe some  
23 others -- you didn't have any information that any of those  
24 companies were or ever had used the trademark Barbecue, did  
25 you?

1           A.     No.

2           Q.     But you went to see them and you took photographs  
3 and you got a lot of information about how they were using --  
4 how they were marketing their own barbecue grills, correct?

5           A.     That was for the development of the packaging, not  
6 the naming part.

7           Q.     But for the one competitor -- you've identified  
8 Variety as a competitor in your prior testimony. The one  
9 competitor that you knew had a registration for The Backyard  
10 for home and garden services, no one as far as you know from  
11 Walmart ever went to see what they were actually doing and  
12 selling in their department, correct?

13          A.     Correct.

14          Q.     Do you know what willful blindness is, Ms. Dineen?

15          A.     Willful what?

16          Q.     Blindness.

17          A.     Yes, I think so.

18          Q.     Isn't it a fact that Walmart was willfully blind in  
19 this case to the fact that Walmart had an existing (sic)  
20 trademark registration that you knew about that was closely  
21 related to the Backyard Barbecue grill project and yet you  
22 studiously -- I say you meaning Walmart -- studiously ignored  
23 determining if there were any other facts that might be  
24 relevant to your proper use of the trademark; isn't that  
25 fair?

1           A.     No. We did not see it as an issue because it was  
2 different products and a different name.

3           Q.     When considering the term Backyard Grill, do you  
4 consider grill to be a generic or descriptive term?

5           A.     Descriptive.

6           Q.     So it's your testimony that anyone can sell grills  
7 and call them grills, correct?

8           A.     Anyone can --

9           Q.     If they're selling grills, they can call it a  
10 grill. It's descriptive, correct?

11          A.     It's a descriptive name. And what you can use,  
12 there is a process to go through.

13          Q.     And if I asked you to go out and buy me a grill,  
14 Ms. Dineen, you would have some general idea of what I was  
15 asking you to purchase, correct?

16          A.     There is lots of grills. I'm not sure --

17          Q.     Fair enough. And you might have to ask me, well,  
18 charcoal or gas or something about the capacity, how many  
19 hamburgers you can cook and so forth?

20          A.     The price.

21          Q.     But you would have a general idea of what I wanted,  
22 correct?

23          A.     General I guess.

24          Q.     Okay. But what if I asked you to go out and buy me  
25 a Backyard, Ms. Dineen?

1           A.     To buy a Backyard?

2           Q.     Yes.  You've said Backyard as -- you view that as  
3     descriptive.  I'm asking you, is descriptive of what.  What  
4     would you buy for me if I asked you to go out and buy me a  
5     Backyard?

6           A.     I'm not sure.  I guess my first thought would be a  
7     lot behind a house is the description of a backyard but --

8           Q.     That's exactly my point.  Which is some evidence,  
9     is it not, that Backyard is in fact a trademark because it  
10    does not describe anything other than perhaps some land out  
11    behind the house and doesn't really describe anything having  
12    to do with grilling and cooking, does it?

13          A.     I think it's very descriptive actually with the  
14    word grill.  I mean, we look at our Backyard Grill to be a  
15    brand that helps entertain family and friends at home which  
16    is typically in the backyard.

17          Q.     Well, I would agree with you, but you said with  
18    grill.  And there's no dispute there because you've got  
19    Colgate and toothpaste.  You've got Backyard and you've got  
20    grill.  You've got a trademark and you've got something that  
21    describes what the trademark relates to.  And my point to you  
22    is, Ms. Dineen, that the term "backyard" itself doesn't tell  
23    you anything about what the product actually is, does it?  If  
24    it did, you would know what I was wanting you to go buy for  
25    me if I asked you to go buy me a Backyard Grill.

1           A.     The word backyard alone?

2           Q.     Yes.

3           A.     Without knowing any other information?

4           Q.     Correct.

5           A.     Doesn't tell you a lot except about the land that's  
6     a backyard.

7           Q.     Right. But it might tell you it's a trademark that  
8     someone owns that relates to something that is otherwise  
9     described in the rest of the trademark, exactly like Walmart  
10    and Variety both use the term "Backyard." And as you  
11    indicated, you filed a trademark. You've told the Trademark  
12    Office that it's a trademark, correct?

13          A.     Yes.

14          Q.     Now, do you remember how the trademark application  
15    was prosecuted in the Trademark Office once it was filed?

16          A.     Not specifically, no.

17                 MR ADAMS: Could you bring up PX-14.

18          Q.     (By Mr. Adams) So this is a copy of part of your  
19    trademark application for Backyard Grill and look down at --  
20    in the lower part that's highlighted. Can you read that, Ms.  
21    Dineen? I can read it for you.

22          A.     Barely.

23          Q.     It says, "No claim is made to the exclusive right  
24    to use grill apart from the mark as shown." That's telling  
25    the reader that the term is not being claimed as part of the

1 trademark, correct?

2 A. No, our intent was to register the name Backyard  
3 Grill with the design. That was the intent of our  
4 application.

5 Q. But that's not what that says, is it? It says  
6 you're making no claim to the exclusive right to use grill  
7 apart from the mark as shown?

8 A. Correct. I believe what that means is that we were  
9 not going to attempt to register the word "grill" by itself.  
10 We were registering Backyard Grill with the design.

11 Q. But, Ms. Dineen, we have seen at least two  
12 exhibits, and we can bring them up if you'd like, but we've  
13 seen at least two examples of where Walmart used the term  
14 Backyard Grill in what we would call a block font with a TM  
15 after the word Backyard and before the word Grill. So  
16 Walmart itself uses the term Backyard in ways other than just  
17 this particular design; is that right?

18 A. I don't think the intent of that was for the word  
19 Backyard only, no.

20 Q. Well, let's bring those up. And I'll move along  
21 while we pull that exhibit up.

22 Now, Ms. Dineen, if Walmart considered Backyard to  
23 be descriptive of barbecue grills, why didn't Walmart display  
24 the word Backyard as being descriptive as well as the word  
25 Grill? You've testified that Backyard is descriptive.

1           A.     We chose the word Backyard with Grill because we  
2     thought the name we chose, Backyard Grill, was descriptive of  
3     the product.

4           Q.     Right. And Grill was descriptive of the product  
5     and you disclaim that, correct? So why not disclaim Backyard  
6     as well?

7           A.     Do you mean claim that in that application you  
8     showed?

9           Q.     Yes. If the term -- if your testimony is correct  
10    and Backyard is descriptive of grills, why is it asserted as  
11    not being descriptive but in fact the trademark in your  
12    trademark application?

13          A.     I don't think I can speak to the wording on that  
14    application, but I can speak to that our intent was to  
15    register Backyard Grill with the design.

16          Q.     I'm going to bring up PX-15. Now, unfortunately  
17    we're not going to be able to enlarge this, but I'll read  
18    part of it. "The undersigned" -- and this is Walmart's  
19    trademark application. And you know someone named Danica  
20    Acosta?

21          A.     Yes.

22          Q.     Who's that?

23          A.     She works in our legal department.

24          Q.     Is she a lawyer?

25          A.     I believe so. I'm not sure what her exact title

1 is.

2 Q. And apparently she's a trademark lawyer because she  
3 signed this trademark application, correct?

4 A. Most likely, yes.

5 Q. So you would expect her to be generally familiar  
6 with trademark law and filing and prosecuting trademark  
7 applications; is that correct?

8 A. That's correct.

9 Q. So let's read it. "The undersigned, being hereby  
10 warned that willful false statements and the like so made are  
11 punishable by fine or imprisonment or both, under 18 U.S.C.,  
12 Section 1001 and that such willful false statements and the  
13 like may jeopardize the validity of the application or any  
14 resulting registration, declares that he/she is properly  
15 authorized to execute this application on behalf of the  
16 applicant, he/she believes the applicant to be entitled to  
17 such mark in commerce. To the best of his knowledge and  
18 belief no other person, firm, corporation, association has  
19 the right to use the mark in commerce" -- this is the point I  
20 want you to pay attention to, Ms. Dineen.

21 A. Okay.

22 Q. " -- either in the identical form thereof or in  
23 such near resemblance thereto as to be likely to cause when  
24 used on or in connection with the goods/services of such  
25 other person -- goods/services of such other person -- to



1 cause confusion or to cause mistake or to deceive and that  
2 all statements made of his/her own knowledge are true and  
3 that all statements made on information and belief are  
4 believed to be true."

5 Did I read that correctly?

6 A. I'm going to assume you did. I can't see the whole  
7 thing from here.

8 Q. Now, when Ms. Acosta filed this application on  
9 behalf of Walmart, first of all, you knew of Variety's -- The  
10 Backyard trademark registration, correct?

11 A. At this time we knew of Variety's registration for  
12 The Backyard for lawn and garden equipment.

13 Q. Right. And you've also testified that you knew of  
14 the Backyard Barbecue registration which we have never seen  
15 and whose name we don't know, but you've said that you knew  
16 of a Backyard Barbecue. Can you tell the jury why neither of  
17 those two registrations were disclosed to the Trademark  
18 Office when you filed your trademark application?

19 A. I can speak from what I know. I can't exactly  
20 speak to what the lawyers' thought process was. But from  
21 what I understand is the same reason that we moved forward  
22 with the Backyard Grill, it was for grills and it was a  
23 different name, Backyard Grill. Yes, did we know that there  
24 were a lot of names out there? Backyard Classic, Backyard  
25 Chef, Backyard Barbecue, but we didn't use those. We went

1 forward with a name that was not being used, that we had  
2 found anywhere, and also with our design of it. So the  
3 Backyard Grill name and design.

4 MR. ADAMS: Your Honor, plaintiff moves to admit  
5 PX-14 and PX-15.

6 THE COURT: Be received.

7 **(Plaintiff's Exhibit Nos. PX-14 and PX-15 received into**  
8 **evidence)**

9 MR. ADAMS: Next exhibit.

10 Q. (By Mr. Adams) This is one of the examples that  
11 I've mentioned a few moments ago in my testimony, Ms. Dineen.  
12 Backyard Grill here with a TM after it, you understand the TM  
13 to mean trademark?

14 A. Yes.

15 Q. This is a trademark claim to what I would call a  
16 block form or a standard form trademark? There's no design  
17 or logo associated with this trademark, is there?

18 A. As it's used here, no.

19 Q. And, in fact, it says it's -- this is a trademark  
20 of Walmart Stores, Inc., in case anyone doubted. So you're  
21 saying here this particular trademark is a trademark of  
22 Walmart Stores, Inc. You're representing this trademark  
23 belongs to Walmart and no one else, correct?

24 A. That's what that would say.

25 Q. All right. And let's look at the box.

1 MR. ADAMS: I think we have a slide on that, don't  
2 we?

3 (Attorney Adams conferring with co-counsel off the record)

4 MR. ADAMS: Bear with us a moment, your Honor.  
5 Almost through.

6 Q. (By Mr. Adams) All right. And here this is PX-6,  
7 Ms. Dineen. I would direct your attention to the upper  
8 right-hand side of this design. First, we see up in the top  
9 a TM next to the word Backyard. Do you see that?

10 A. Yes.

11 Q. And that is an indication, is it not, that Walmart  
12 contends that or claims that the word "backyard" itself is a  
13 trademark, correct? Otherwise, the TM would be somewhere  
14 down below the Grill or word Grill?

15 A. I'm not really sure on that. The way you have it  
16 stacked with Backyard and Grill on the top, that TM appears  
17 to be associated with the whole name.

18 Q. Well, maybe this will clarify your thinking. If  
19 you look down just below there under \$158 --

20 A. Yes.

21 Q. -- you see there the term TM that's in the block  
22 form, the term TM is also in back of Backyard and in front of  
23 the word Grill?

24 A. Yes.

25 Q. Isn't it a fair assumption based on what you see

1     there that Walmart is suggesting to everyone who sees that  
2     that it's the word Backyard and not the phrase Backyard Grill  
3     that's the trademark, correct?

4           A.     Yes.   That one doesn't look right and was not our  
5     intent.

6           Q.     Same thing with the accessories, correct?  Backyard  
7     TM Grill.  17-piece toolset.  The Backyard is the trademark?

8           A.     Yes.  It looks like the examples you're showing  
9     here were all done in the same way when we got to the part of  
10    the ad outside the logo that described the item.  Many times  
11    we would not use the logo in that part of the description  
12    just because of space.  We'd have the logo as you see where  
13    it is and then in the regular copy next to the price point we  
14    may not use the design.

15          Q.     So the testimony we heard earlier that Walmart  
16    always used the logo and the design as its trademark is not  
17    correct, is it?

18          A.     I think this is a different use of it.  This is  
19    where we get into copy of the item and it's not used alone.  
20    The logo is right there as well.

21          Q.     All right.  Two more questions, Ms. Dineen, and  
22    I'll be finished.  If you were Dunkin' Donuts and someone  
23    started selling pastries under the trademark Dunkin' Danish,  
24    would you believe that your Dunkin' Donuts trademark was  
25    being infringed?

1           A.     I'm not sure. We've had some cases ourselves where  
2 people come close to the names. When you use two names, if  
3 one of the names is descriptive it sometimes is commonly  
4 used. There's been cases where we have it that are similar  
5 to that that we haven't been overly concerned.

6           Q.     And finally, Ms. Dineen, what do you think Walmart  
7 would have done if it had learned in 2013 that Variety's  
8 Roses Stores had started using Backyard Grill on its private  
9 label grills and accessories and sold almost a billion  
10 dollars' worth?

11          A.     Okay. So if we would have found out that you used  
12 the same name --

13          Q.     Yes, Backyard Grill.

14          A.     -- that we had? Yeah, I think we would have an  
15 issue with the same name.

16          Q.     Okay.

17                 MR. ADAMS: No further questions, your Honor.

18                 THE COURT: All right.

19                 MR. HOSP: Literally two minutes.

20                 THE COURT: Two minutes?

21                 MR. HOSP: Two questions.

22                 THE COURT: Okay. You're keeping these people from  
23 their lunch, so I would be very careful about how long you  
24 went because they'll punish you severely for that.

25                 MR. HOSP: Understood, your Honor.

**REDIRECT EXAMINATION**

BY MS. HOSP:

Q. I just want to clarify your testimony. You testified that you were made aware that there was another company using Backyard Barbecue, correct?

A. Yes.

Q. Do you recall specifically whether that use was in the form of a registration or just a common law use?

A. I'm not sure.

MR. HOSP: Thank you, your Honor.

THE COURT: Okay. We'll be in recess until 10 minutes to 2.

(Jury out at 12:28 p.m.)

(Witness Excused)

(Lunch recess at 12:28 p.m. to 1:55 p.m.)

(No jury present)

THE COURT: Somebody wanted to see me?

MR. ADAMS: Your Honor, just very briefly, I wanted to raise a point. It wasn't entirely clear to me that I made a complete record of the question that I asked your Honor at the very end of Ms. Dineen's testimony. If you'll bear with me two minutes, I think you'll understand exactly what I'm doing and why.

Backyard Barbecue is one of the most significant issues in this case as far as Backyard Grill is concerned.

1 When your Honor drafted the summary judgment order, it said,  
2 quote, at some point the preferred brand name apparently  
3 shifted to Backyard Grill from Backyard Barbecue. At that  
4 point no one knew why, and that's reflected in your Honor's  
5 order.

6 That's the single most important factual issue in  
7 this case, the similarity between Backyard Barbecue and  
8 Backyard Grill. During the profits disgorgement trial there  
9 was testimony -- of course, that was after the summary  
10 judgment -- that the change was because of a third-party mark  
11 for Backyard Barbecue and they claim privilege on that issue.  
12 Today Ms. Dineen testified that the specific reason that  
13 Walmart changed from Backyard Barbecue to Backyard Grill was  
14 because of a trademark registration or pending application  
15 for Backyard Barbecue. No such registration or pending  
16 application exists. So Mr. Hosp on redirect encouraged Ms.  
17 Dineen to say, well, it could have been a common law usage.

18 They have never identified that third party to us  
19 in this litigation. That cannot possibly be privileged  
20 information. That is a fact. In fact, we know what the  
21 advice was, and if anything was privileged, it was the advice  
22 of their attorneys not to use it, but the issue of the  
23 third-party name simply cannot be privileged.

24 We are entitled to know who that party is, and I  
25 really don't want to compromise the trial by having that

1 issue go up on appeal. We need to know who that third party  
2 is.

3 THE COURT: I'm not sure I understand what your  
4 point is.

5 MR. ADAMS: The point is that the justification  
6 that Walmart has given before summary judgment and the  
7 profits disgorgement trial and this case and the reason they  
8 changed from Backyard Barbecue to Backyard Grill was because  
9 of what they now say was an unknown third-party use. We're  
10 entitled to know who that third-party use was or even if  
11 there was one. I asked Mr. Hosp after we adjourned for lunch  
12 if he would identify it and he said, no, it's privileged.  
13 We're entitled to know that fact. We're entitled to know who  
14 that third-party user of Backyard Barbecue was.

15 THE COURT: You don't have to answer if you don't  
16 want to.

17 MR. HOSP: I'm not sure what the request is.

18 THE COURT: I'm not either.

19 MR. HOSP: We have -- in discovery. Thank you,  
20 your Honor.

21 THE COURT: I'm not either. What do you expect me  
22 to do? What is it you're trying to get at?

23 MR. ADAMS: Your Honor, the request is that you  
24 order Walmart to identify that fact. Who is the third-party  
25 user of Backyard Barbecue that they say they relied on in



1 changing from Backyard Barbecue to Backyard Grill. That's  
2 our motion.

3 THE COURT: Try again. You want me to order them  
4 to do something? We're in the middle of a trial. You had  
5 cross-examination --

6 MR. ADAMS: Yes, and they refused to answer.

7 THE COURT: They didn't refuse to answer. They may  
8 not have given you what you thought you were going to get,  
9 but they gave you an answer. I mean, you've got a jury here.  
10 You can argue all that to the jury.

11 MR. ADAMS: Fair enough. I think our position --

12 THE COURT: What you're saying is remarkably novel  
13 in a jury trial. I've never heard any lawyer in five or six  
14 or 700 trials do what you're doing right now. So maybe I'm  
15 the one that's lacking or maybe you're the one that's  
16 lacking. I don't know.

17 MR. ADAMS: From my own viewpoint, I don't think  
18 it's particularly novel to ask a Court to order a witness to  
19 answer a question when it's not properly privileged.

20 THE COURT: The witness has answered the question.

21 MR. ADAMS: No, she refused to answer on the  
22 grounds of privilege. And my point is that the name of a  
23 third-party user is not itself privileged. The advice that  
24 they may have given -- the advice that Walmart's attorneys  
25 may have given concerning that third party may be privileged

1 but the name, the actual fact, the name of that party is not  
2 privileged information. And without it, we have no idea who  
3 that is and what the relevance of that may be to this case.

4 THE COURT: I'm not going to order them to do what  
5 you say, so you can just delay the trial as long as you want  
6 by being an obstructionist.

7 MR. ADAMS: I'm not interested in delaying the  
8 trial.

9 THE COURT: That's up to you. You're the  
10 plaintiff.

11 MR. ADAMS: We've put our point on the record and I  
12 appreciate your Honor's patience.

13 THE COURT: Yeah.

14 Bring the jury in.

15 (Jury in at 2:01 p.m.)

16 THE COURT: Are you ready with another witness?

17 MS. GARKO: Yes.

18 THE COURT: Call your next witness.

19 MS. GARKO: Your Honor, before we do that, we have  
20 five exhibits that need to be moved in and haven't been moved  
21 in yet.

22 THE COURT: Wait a minute.

23 MS. GARKO: We move into evidence D-91, D-196,  
24 D-203, D-281, which is the physical grill sitting there, and  
25 DX-6.

1 THE COURT: Received.

2 **(Defendant's Exhibit Nos. D-91, D-196, D-203, D-281 and DX-6**  
3 **received into evidence)**

4 MS. GARKO: Walmart calls David Ortiz.

5 THE WITNESS: I do.

6 **DAVID ORTIZ**

7 having been duly sworn, testified as follows:

8 MS. GARKO: May I approach the witness, your Honor?

9 THE COURT: Yes.

10 (Attorney Garko providing exhibit binder to the witness)

11 **DIRECT EXAMINATION**

12 BY MS. GARKO:

13 Q. Good afternoon.

14 A. Good afternoon.

15 Q. You've been sitting here for the last day and a  
16 half, but please introduce yourself to the jury.

17 A. Yes. My name is David Ortiz.

18 Q. Where do you work?

19 A. I work for Walmart.

20 Q. And what do you do at Walmart?

21 A. I am the vice-president divisional merchandise  
22 manager of outdoor living.

23 Q. And what do you do in that role?

24 A. I oversee the merchants, or the buyers as we call  
25 them, and the merchandise that we put into our stories.

1 Q. Is there a particular product category you oversee?

2 A. I do. There's many in outdoor living, but the ones  
3 we're talking about here are grilling and grill accessories.

4 Q. Are you familiar with Walmart's Backyard Grill  
5 brand products?

6 A. Yes, ma'am.

7 Q. That's one of Walmart's private label brands?

8 A. Yes, ma'am.

9 Q. What responsibilities, if any, have you had with  
10 respect to the Backyard Grill products?

11 A. Well, when I took over the responsibility as the  
12 vice-president divisional merchandise manager that came with  
13 it.

14 Q. And how long have you been in outdoor living?

15 A. Four and a half years.

16 Q. And how long have you been at Walmart more  
17 generally?

18 A. Two different stints but a total of right at 35  
19 years.

20 Q. So you've had other jobs at Walmart?

21 A. I've had a lot.

22 Q. Can you briefly explain to the jury what other jobs  
23 you've had at Walmart?

24 A. Well, I started while I was going to school working  
25 part time putting bicycles and tricycles and back in the Big

1     Wheels together.

2             And then upon graduation from school -- first in my  
3     family to graduate from college, happy about that -- went to  
4     work for Walmart as a management trainee, was in a number of  
5     stores for three or four years, and then I had the  
6     opportunity to come to the home office in Bentonville,  
7     Arkansas.

8             There I was in many roles. Buyer most of the time,  
9     or merchant as we call it, in men's wear and ladies' wear and  
10    our seasonal area, stationery, optical division. Was in our  
11    sourcing division two or three times and then in  
12    horticulture, which is our live plant area, and then also in  
13    housewares. And then most recently the job I'm in today,  
14    which is outdoor living.

15            Q.     Based on that experience, do you have a sense of  
16    who Walmart's customers are?

17            A.     I do.

18            Q.     Who are they?

19            A.     Well, because of the number of stores we have and  
20    how large of a territory that we do cover, we serve really  
21    pretty much all of America, we like to think of it, but the  
22    data would also show that we do that as well. So we serve  
23    all customers. Every demographic you can think of, every  
24    income level. So a broad number of customers.

25            Q.     How, if at all, does that affect the products that

1 Walmart chooses to offer to its customers?

2 A. Well, because we're known as a mass merchant or  
3 discounter, we have to appeal to a large number of customers.

4 Q. And as part of that, do you offer products in the  
5 good, better, best categories that we've heard about earlier?

6 A. Yes, ma'am, we do.

7 Q. And based on your experience with respect to the  
8 good category, what's the reason folks are buying products at  
9 that price -- that price point?

10 A. Well, it's price. At that price point or at that  
11 level.

12 Q. And am I correct that Backyard Grill fell into the  
13 good category?

14 A. Yes.

15 Q. Now, Mr. Ortiz, at some point in time did Walmart  
16 start selling private label grills and grilling accessories  
17 that had something other than the Backyard Grill name on  
18 them?

19 A. Yes, ma'am, we did.

20 Q. What name, if any, did those products have on them?

21 A. There was no name.

22 Q. No name?

23 A. No name.

24 Q. How does the packaging of the products that had the  
25 Backyard Grill name on them compare to products that had no

1 name on them?

2 A. They were identical.

3 Q. Mr. Ortiz, I would like to direct you to the binder  
4 in front of you.

5 A. Yes.

6 Q. Do you have that there?

7 A. Yes, I do.

8 Q. Could you please turn to the first exhibit in your  
9 binder, which is 220. What's shown there?

10 A. What's on the screen, it's a stainless steel large  
11 bar burner.

12 Q. That was a Backyard Grill product?

13 A. Yes.

14 Q. If you can look at the next Exhibit, D-221. What's  
15 that?

16 A. This is a 60-inch grill cover.

17 Q. And that was a Backyard Grill product?

18 A. That's correct.

19 Q. If you can next turn to Exhibit D-222. What's  
20 shown there?

21 A. This is a super-size double brush.

22 Q. Again with the Backyard Grill name on it?

23 A. Yes, ma'am.

24 Q. And if you can turn to the last Exhibit there,  
25 D-223. Can you tell the jury what's shown there.

1           A.     This is a four-burner gas grill box.

2           Q.     And this again was with the Backyard Grill name?

3           A.     Yes.

4           Q.     These four products that we just looked at, do  
5 these accurately depict how the packaging looked on Walmart's  
6 private label grill and grilling accessories with the  
7 Backyard Grill name?

8           A.     That would be correct.

9           Q.     With respect to these types of products -- the  
10 four-burner gas grill, the brush -- how would product  
11 packaging have looked for the products that had no name on  
12 them?

13          A.     The name would not -- where the name is, that would  
14 be a black background.

15          Q.     Otherwise identical?

16          A.     Identical down to the type face, down to the color.

17          Q.     Did Walmart ever reference Variety or Roses on any  
18 of its grills or grilling accessories?

19          A.     Never.

20          Q.     Did Walmart ever use just Backyard on any of its  
21 grills or grilling accessories?

22          A.     No, ma'am.

23          Q.     Did Walmart ever use Backyard BBQ or Barbecue on  
24 any of its grills or grilling accessories?

25          A.     No.



1           Q.     After Walmart introduced grills and grilling  
2 accessory products that had no name on them, did you monitor  
3 how that product introduction went?

4           A.     Well, I didn't personally monitor it. As I  
5 mentioned, I have a team of buyers and merchants that manage  
6 the business, but they would have definitely been monitoring  
7 the business because of sales. That's what they get  
8 evaluated off of. They would have been looking at it.

9           Q.     And those folks would have reported to you?

10          A.     They would have.

11          Q.     Were there any issues reported to you about the new  
12 no-name products?

13          A.     None.

14          Q.     If there had been any issues or questions or  
15 concerns about the no-name products, would you have expected  
16 to hear about them?

17          A.     Oh, absolutely.

18          Q.     Why do you say that?

19          A.     Well, we have a lot of stores. I think you heard  
20 it mentioned before we have 4,000 plus stores. A lot of  
21 stores. I find it interesting that in the courtroom  
22 listening that our opposing counsel here, they don't know --  
23 doesn't sound like they talk to their stores. I talk to the  
24 stores every day.

25                 So to your question about how do we get this

1 information, stores e-mail me -- this morning I got an e-mail  
2 as a matter of fact from -- I get them every day from stores  
3 like I need something. The customer needs -- the one example  
4 this morning would have been from Florida that needed hoses  
5 and some other things because it's 80 degrees in Florida and  
6 they didn't have that product. So I have store managers  
7 e-mailing my personal e-mail -- not my personal e-mail, my  
8 company e-mail -- and my personal -- or my company phones.

9 So we're a large company, but we're like really  
10 small. And that's how our founder built our company is to  
11 have that communication directly with the stores to take care  
12 of the customers. So we would have heard about it.

13 Q. That kind of direct contact that you're having with  
14 the stores and store managers, does that happen frequently?

15 A. It happens every day.

16 Q. Do you recall hearing Mr. Blackburn testify  
17 yesterday that he would have thought it was nearly impossible  
18 for instances of customer confusion to filter up so that  
19 folks in the home office at Variety would have heard about  
20 them? Do you remember that testimony?

21 A. I do.

22 Q. Do you think that would be true at Walmart?

23 A. I do not think that would be true at Walmart.

24 Q. Why not?

25 A. Well, there's a couple other ways we get

1 information too. We have a system called Remedy in which  
2 stores actually put in information to us, questions that come  
3 to us, and we have to respond within 48 hours. And we get  
4 every single day a red, green or yellow chart, for lack of  
5 better words, a chart that says have we responded within  
6 24 hours to the store's requests or asks. Sometimes that  
7 request can be what we're discussing here, sometimes it can  
8 be I need more products. Sometimes it could be -- who knows  
9 what it is. But then it goes to 48 hours.

10 And then when it goes past 48 hours it goes red.  
11 And that's when people get excited in my company about that  
12 being red and not being responsive to stores. So that's one  
13 way. As I mentioned before, the e-mails that I get, the  
14 phone calls that we get. So we take it very seriously to  
15 respond to our stores and to our customers.

16 Q. Do you get any feedback directly from customers as  
17 well?

18 A. Yes.

19 Q. How does that happen?

20 A. Well, the same way. The customers can actually  
21 talk to our associates in the stores and our stores bubble up  
22 that question or that concern when customers don't have what  
23 they want or when we don't have what we want, the customers  
24 let our associates know that on the front lines they don't  
25 have something. It could be as simple as out-of-stocks. I

1 mean, we may not have something on the floor, actually  
2 physically we're out of stock of. Stores e-mail us and say  
3 customers are wanting this, what's wrong. We may have  
4 something greater as a problem. Replenishment issue, supply  
5 issue or whatever, but they definitely let us know.

6 Q. And did you hear about any instances of anyone  
7 being confused between Walmart's products and Variety's  
8 products through any of those channels you just described?

9 A. We did not.

10 Q. Going back to the no-name products for a moment,  
11 did you hear anything from customers about those no-name  
12 products after they were introduced?

13 A. We did not.

14 Q. Did you hear any reports at the store level about  
15 those no-name products?

16 A. No.

17 Q. And did you hear any reports at the home office  
18 level about those no-name products?

19 A. We did not.

20 Q. And the folks that work with you in the home  
21 office, would they be in a position to also hear any issues  
22 or questions or concerns about products?

23 A. No different than me. The stores -- we actually  
24 publish it internally. The stores have our buyers' phone  
25 numbers, their desk phone numbers as well as their e-mails as

1 well, so even though I'm talking about me, our merchants get  
2 the same information as well.

3 Q. And would you expect that if there are issues or  
4 questions or concerns about these no-name products that they  
5 would have been brought to your attention?

6 A. Oh, yes.

7 Q. So through all these sources, the home office, at  
8 the store level, from the customers, did you ever receive any  
9 questions, concerns, complaints about introduction of the  
10 no-name products?

11 A. We did not.

12 Q. Did the fact that you never heard any complaints or  
13 concerns or questions about these no-name products tell you  
14 anything?

15 A. Yes.

16 Q. What did it tell you?

17 A. That the name was not important to our customer.

18 Q. Did that surprise you?

19 A. Not really.

20 Q. Why do you say that?

21 A. Well, you've heard the last couple of days, it's  
22 about the price point, it's about the value, it's about what  
23 the customer needs at that particular time for that price  
24 point, and the name wasn't as important as, you know, maybe  
25 it would seem.

1 Q. Did the fact that you never heard anything from  
2 customers about the no-name brand tell you anything about the  
3 strength of the Backyard Grill brand?

4 A. Yes.

5 Q. What did it tell you?

6 A. It was not important to the customer.

7 Q. Was it weak?

8 A. I would say it was not strong. I would say it's  
9 probably a weak brand.

10 Q. Mr. Ortiz, are you aware of the sales performance  
11 of Walmart's private label grills and grilling accessories  
12 for Walmart's products that use The Backyard name grill and  
13 those products that had the no name?

14 A. Yes, I am.

15 Q. How do those sales levels compare?

16 A. They were similar. Pretty much identical.

17 Q. So just so we're clear, whether the products were  
18 sold with Backyard Grill or the products were sold with no  
19 name, the sales levels were comparable?

20 A. Yes, ma'am.

21 Q. Does that tell you anything about the reason why  
22 customers were buying Walmart's private label Backyard Grill  
23 and grilling accessories?

24 A. Yes.

25 Q. What does it tell you?

1           A.     It sounds like the -- earlier you heard Marvin talk  
2 about the organizing principle. It was organized, it looked  
3 good, quality was there, the price was there, customer voted.

4           Q.     Now, Mr. Ortiz, do you also recall Mr. Blackburn  
5 testifying about how Walmart didn't stop selling Backyard  
6 Grill branded products when Variety complained back in 2012  
7 and 2014? Do you remember that testimony?

8           A.     Yes.

9           Q.     Why didn't Walmart stop selling then?

10          A.     We did nothing wrong. The due diligence was done  
11 clearly. Pretty exhaustively. The name, different; the  
12 design, different. The whole look was different. We didn't  
13 hear any customer complaints. Stores didn't complain. And  
14 so we kept selling, offering our customers the product.

15                 MS. GARKO: I have no further questions at this  
16 time.

17                 THE COURT: Do you have any cross?

18                 MR. LONG: Just a few questions, your Honor.

19                         **CROSS-EXAMINATION**

20          BY MR. LONG:

21           Q.     Back to the due diligence you just mentioned, was  
22 it true that you were not in the lawn and garden department  
23 when that due diligence was done in 2010, '11?

24           A.     On this particular brand, you're correct.

25           Q.     Back to this no-name product, do you recall

1     testifying in an earlier proceeding in this case? A couple  
2     years ago?

3             A.     Yes.

4             Q.     Do you recall testifying then about the unbranded  
5     grills?

6             A.     Not specifically.

7             MR. LONG: Your Honor, if I could refresh his  
8     recollection with a transcript.

9             THE COURT: All right.

10            (ATtorney Long providing transcript to the witness)

11            Q.     (By Mr. Long) Let's look on page 203 of the  
12     transcript down at line ten. You were questioned, "Okay.  
13     You just had a generic product?" What was your response?

14            A.     "Without a name on it?" Or yes --

15            Q.     Then the next question was, "Without a name on it?"  
16     And your response was?

17            A.     "Yes, sir."

18            Q.     The next question was, "The imputed thing is that  
19     it's the store product?"

20            A.     Yes.

21            Q.     Now, a store product in a Walmart store would be a  
22     Walmart product, correct?

23            A.     That would be a product that a retailer says -- a  
24     store product can be a private brand, private label or a  
25     store brand.



1           Q.     A Walmart product is an unbranded product, you said  
2 was the imputed thing, a Walmart product. Is Walmart a  
3 well-known trademark?

4           A.     I would say it is.

5           Q.     Walmart is the largest retailer in the world?

6           A.     Retailer, I think we are.

7           Q.     So isn't it true that a Walmart store grill, the  
8 unbranded Walmart store grill, sold just as well as a  
9 Backyard Grill? That's what you just testified?

10          A.     If it had a Walmart name on it?

11          Q.     You said the imputed thing was that the unbranded  
12 grill was a Walmart store product.

13          A.     I'm not sure what your question is.

14          Q.     That the unbranded imputed Walmart branded grill --

15          A.     Okay.

16          Q.     -- sold just as well as the Backyard Grill branded  
17 grill.

18          A.     Okay.

19          Q.     Are you aware that McDonald's restaurant sells  
20 Coca-Cola? It serves Coca-Cola?

21          A.     I don't know what they do.

22          Q.     My understanding is that they do. Do you suppose  
23 that if McDonald's were to cease selling Coke and sold Pepsi,  
24 they would probably sell the same number of sodas with their  
25 Big Macs?

1 A. I'm not sure the point --

2 Q. Well, the point is that if they substitute Coke for  
3 Pepsi, people are still going to get a beverage when they go  
4 to the restaurant. And so the point is that Coca-Cola is not  
5 a weak brand just because they would have sold the same  
6 amount of Pepsi as they did with Coca-Cola; is that correct?

7 | A. It's speculative, I guess, but yes.

8 MR. LONG: Well, I think that's all I have, your  
9 Honor.

10 THE COURT: All right. Is that it?

11 MS. GARKO: Yes, your Honor. I need to move in  
12 Exhibits D-220, 221, 222 and 223.

13 THE COURT: They'll be received.

14 (Defendant's Exhibit Nos. D-220, 221, 222 and 223 received  
15 into evidence)

16 THE COURT: Thank you.

17 (Witness Excused)

18 THE COURT: Next witness.

19 MS. GARKO: Your Honor, Walmart calls Hal Poret.

20 THE WITNESS: Yes, I do.

21 HAL PORET

22           having been duly sworn, testified as follows:

23 MS. GARKO: May I approach, your Honor?

24 (Attorney Garko providing exhibit binder to the witness)

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**DIRECT EXAMINATION**

BY MS. GARKO:

Q. Good afternoon.

A. Good afternoon.

Q. Can you please introduce yourself to the jury.

A. Sure. My name is Hal Poret.

Q. And were you retained to offer an expert opinion in this case?

A. Yes.

Q. Who were you retained by?

A. By Walmart.

Q. What were you asked to do?

A. I was asked to design and carry out and analyze a survey of consumers to test whether Walmart shoppers would be likely to be confused by Walmart's use of the Backyard Grill on its products.

Q. What do you mean by likely to be confused?

A. I mean likely to make the mistake to look at the Walmart product that says Backyard Grill and think that it has some -- that it's from Variety or it had some connection to Variety or Roses.

Q. You said you were asked to conduct a survey?

A. Yes.

Q. Did you do that?

A. Yes, I did.

1 Q. And at a high level -- we'll come back to this in a  
2 little more detail, but at a high level what did that survey  
3 show?

4 A. It showed that Walmart using the Backyard Grill  
5 name is not likely to cause confusion with Variety.  
6 Essentially none of the 209 people who took the survey and  
7 saw the Walmart Backyard Grill products thought that it had  
8 anything to do with Roses or Variety or any other Backyard  
9 Grill brand.

10 Q. In your experience, Mr. Poret, are surveys like  
11 this common in trademark cases?

12 A. Yes, they're very common.

13 Q. I just want to back up briefly and talk about your  
14 qualifications for a moment. Do you have a particular area  
15 of expertise?

16 A. Yes. Survey research.

17 Q. And what does that mean?

18 A. It means that I conduct consumer surveys. That's  
19 my job. That's what I do every day.

20 Q. What's your educational background to do that?

21 A. I have a Bachelor's in math from Union College, I  
22 have a Master's in math from the State University of New York  
23 at Albany, and I have a JD from Harvard Law School.

24 Q. Are you currently employed?

25 A. Yes.

1 Q. Where are you employed?

2 A. I run my own survey research business under my  
3 name, Hal Poret.

4 Q. How long have you done that?

5 A. Since the beginning of 2016.

6 Q. And what did you do before 2016?

7 A. For about the 12 years before that I was vice-  
8 president and then senior vice-president at ORC  
9 International, which is a market research and business  
10 research firm.

11 Q. What was the focus of your work during the time at  
12 ORC and now at your own company?

13 A. I designed and carried out consumer surveys. I've  
14 -- over 14 years I've done over a thousand consumer surveys  
15 basically designing them and carrying them out and analyzing  
16 them. And I've also in other cases like this done surveys  
17 and been an expert, given testimony on surveys.

18 Q. Who are you conducting these surveys for?

19 A. A big variety of -- everything from little  
20 companies to medium-sized companies to large ones. Companies  
21 like Walmart and Variety or Apple, Coca-Cola, all kinds of  
22 companies.

23 Q. Could you -- do you have a binder there?

24 A. Yes.

25 Q. Could you please turn to Exhibit D-83 in your

1 binder?

2 A. Okay.

3 Q. What's that document?

4 A. That's my CV.

5 Q. And is it accurate and up to date at the time it  
6 was submitted?

7 A. Yes.

8 MS. GARKO: Your Honor, we would offer Exhibit  
9 D-83.

10 THE COURT: It will be received.

11 **(Defendant's Exhibit No. D-83 received into evidence)**

12 MS. GARKO: Your Honor, at this time we ask that  
13 Mr. Poret be qualified as an expert in survey research.

14 THE COURT: He's an expert. He can express his  
15 opinion.

16 Q. (By Ms. Garko) Now, Mr. Poret, let's talk about  
17 the survey you did. What was the general format of the  
18 survey?

19 A. It's a customer intercept survey.

20 Q. What does that mean?

21 A. It means that we walked up to people in a store and  
22 stopped them to see if we could ask them some questions and  
23 to do a survey.

24 Q. Where did you conduct your survey?

25 A. It was done in select Walmart stores in the state

1 of North Carolina.

2 Q. Where in North Carolina was it done?

3 A. There were four stores. There was Zebulon, Mount  
4 Airy, Clinton and New Bern.

5 Q. Why did you choose those cities in North Carolina?

6 A. Well, we did the survey in North Carolina because  
7 that's where Variety started and has its biggest  
8 concentration of stores. And we picked the four locations  
9 around the state where there was a high concentration of  
10 Roses and other Variety Stores and where we could find a  
11 Walmart store that was as close as possible to a Roses store.

12 Q. Why did you want to do that? Why did you want to  
13 pick where there was a high concentration of Roses stores and  
14 Walmart stores were close to Roses stores?

15 A. I was trying to be as fair as possible to Variety  
16 so that we would do the survey in the places where people  
17 would have the most strong awareness of Roses and have had  
18 the most chance to shop at Roses and know any brand that they  
19 use.

20 Q. Was there any particular type of Walmart customer  
21 that you included in your survey?

22 A. Yes. It was people who live in the area and shop  
23 at Walmart and who recently have bought grills or grilling  
24 accessories or said they were going to buy grills or grilling  
25 accessories.

1           Q.     Did you include in your survey only people that had  
2 experience with Roses or Variety or their Backyard mark?

3           A.     Not only that type of people.

4           Q.     Why didn't you only include those folks?

5           A.     Because a survey is supposed to be realistic, it's  
6 supposed to be testing what's going to happen with real  
7 consumers, and the real world is that some people in Walmart  
8 have been to Roses and might know their brands and others  
9 might not. So it wouldn't make sense to limit a survey only  
10 to one type of person.

11          Q.     You said that you conducted a survey in Walmart  
12 stores. Why did you do that?

13          A.     For one reason because most of these products are  
14 sold in Walmart stores, so doing the survey there with the  
15 actual products and actual Walmart customers is the most  
16 realistic simulation of the true-world conditions. And also  
17 because, as I said before, that was the best way to get -- to  
18 find people who live and shop closest to Roses and would know  
19 them the best.

20          Q.     Within the Walmart store how did you select people  
21 to participate in your survey?

22          A.     Interviewers walked up to people who were shopping  
23 in the outdoor area and asked them permission if they could  
24 ask them some questions and see if they were qualified to  
25 take a survey.



1 Q. What do you mean by qualified?

2 A. Well, in this case qualified would have meant they  
3 had to be old enough, they had to be adults, and they had to  
4 be people who had recently purchased a grill or grilling  
5 accessories or people who said they were going to buy a grill  
6 or grilling accessories.

7 Q. So once folks were deemed to be qualified and were  
8 able to take the survey, what happened then?

9 A. They were brought over to an interviewing area  
10 where a bunch of Walmart products were set up for them so  
11 that they could look at them and be asked some questions  
12 about them.

13 Q. Mr. Poret, can you please turn to Exhibit D-237 in  
14 the binder in front of you.

15 A. Okay.

16 Q. What is shown in Exhibit D-237?

17 A. These are the products that the people who took the  
18 survey were shown. This first one is a 17-inch portable gas  
19 grill that they were shown in the box like that.

20 Q. What was the next product?

21 A. The next product was a three-burner gas grill with  
22 a side burner, and that one was actually set up so they could  
23 inspect it and see it up close, including seeing the Backyard  
24 Grill name.

25 Q. I'm sorry, I just want to make sure we're

1 following -- this up on the screen is the three-burner gas  
2 grill?

3 A. Yes.

4 Q. And then the next product they were shown?

5 A. The next one was an 18-and-a-half-inch charcoal  
6 grill which was also set up and they could walk around and  
7 look at it up close and see the Backyard Grill name.

8 Q. And what was the next product they were shown?

9 A. They were also shown two accessories, a 60-inch  
10 grill cover and a 17-piece premium barbecue set.

11 Q. Are these pictures of the actual products that the  
12 participants were shown?

13 A. Yes.

14 MS. GARKO: Your Honor, we move Exhibit D-237 into  
15 evidence.

16 THE COURT: It will be received.

17 **(Defendant's Exhibit No. D-237 received into evidence)**

18 Q. (By Ms. Garko) Why were these products we showed  
19 the jury selected?

20 A. Basically just to show a range of -- to give the  
21 folks taking the survey a realistic sense of the various  
22 products that Walmart sold that had the Backyard Grill name  
23 on it.

24 Q. Do you show respondents -- I'm sorry. Did you show  
25 the survey participants Walmart and Variety's products at the

1 same time?

2 A. No. They didn't see Variety's products.

3 Q. Why didn't you also show them Variety's products?

4 A. Because the survey is supposed to simulate  
5 something realistic, what would really happen in a Walmart  
6 store with these customers, and the Variety products are not  
7 sold there so consumers would not see Variety's and Walmart's  
8 products together in the real world, so that wouldn't be  
9 realistic to do in the survey.

10 Q. Going back to the products that people did see, how  
11 were these products shown to the survey participants?

12 A. They were all set up around an interviewing table,  
13 so those smaller products that were in packages were sitting  
14 on the table and the two grills that were larger were set up,  
15 and the respondents could take as much time as they wanted to  
16 look at them and inspect them until they were ready.

17 Q. Mr. Poret, if you could look in your binder at  
18 Exhibit D-238.

19 A. Okay.

20 Q. Can you tell the jury what's shown there.

21 A. Yes. These are some photos that we had taken of  
22 the interviewing area to give a sense of where the folks  
23 taking the survey were and what they were looking at.

24 Q. It looks like on the first page the Zebulon and  
25 Mount Airy stores; is that right?

1           A.     Yes.

2           Q.     If we could go to the next page.

3           A.     And these are photos from the Clinton and New Bern  
4 stores of the interviewing area that was set up.

5           MS. GARKO:   Your Honor, we would move Exhibit D-238  
6 into evidence.

7           THE COURT:   It will be received.

8           **(Defendant's Exhibit No. D-238 received into evidence)**

9           THE COURT:   Does it matter that these products --  
10 each side in the case, that their products are only marketed  
11 in their proprietary settings rather than in a neutral third-  
12 party setting? Does that make any sense to you?

13          THE WITNESS:   Yeah --

14          THE COURT:   For instance, if you went into ACE  
15 Hardware, which is a popular outlet --

16          THE WITNESS:   Sure.

17          THE COURT:   I don't know how big they are but  
18 they're popular around here. You would not see a Variety  
19 grill nor a Walmart grill, would you?

20          THE WITNESS:   Right.

21          THE COURT:   Because they don't sell in third-party  
22 locations.

23          THE WITNESS:   Right. That's right.

24          THE COURT:   So is that significant?

25          THE WITNESS:   It is significant, and it's

1 significant to why the survey was done this way. What's  
2 significant is that since in a Walmart store you would only  
3 see the Walmart product and you would not see the Variety  
4 product, that's why it made sense to do the survey in the  
5 Walmart stores and only show the Walmart product because  
6 that's the only true consumer experience that anyone could  
7 have had who bought any of the Walmart products.

8 THE COURT: If you went into this fictional ACE  
9 Hardware store down the street here, you might find a  
10 Char-Grill brand, you might find a Weber brand, maybe there's  
11 some other known national brand, right?

12 THE WITNESS: Yeah. And I think if you wanted to  
13 find out in a survey whether people in an ACE store would  
14 confuse Weber and Craftsman or whatever they are, you could  
15 do a survey where you show those together in an ACE. But in  
16 this case since what we're concerned about is whether people  
17 who were in Walmart and saw the Walmart products were  
18 confused, then the survey needs to be built around the way  
19 things appear in a Walmart store which, as you've said, is  
20 just the Walmart product.

21 THE COURT: Okay. Go ahead.

22 Q. (By Ms. Garko) So, Mr. Poret, if the products were  
23 shown to people in a Walmart store, would that mean that  
24 there are other products in the surrounding area?

25 A. Yes, just a regular Walmart store, so there were

1 all kinds of other products.

2 Q. Does that matter in the survey you conducted at  
3 all?

4 A. No.

5 Q. Why not?

6 A. Because, again, the survey is supposed to simulate  
7 a real-world experience and, of course, a real-world  
8 experience in Walmart is that the consumer is going to see  
9 all kinds of products in other parts of the store and  
10 surrounding it, so there's no reason that shouldn't happen in  
11 the survey too.

12 Q. And the surveys were conducted in four different  
13 stores, so were the surrounding products different between  
14 those stores as well?

15 A. Yes. I mean, any Walmart store probably has some  
16 variation in whatever products they saw around.

17 Q. Does that matter to your survey at all?

18 A. No.

19 Q. Why not?

20 A. For the same reason. The real world is that there  
21 are different Walmarts with different products around and  
22 consumers see different products around. So if that happens  
23 in the survey, that's true to the real world.

24 Q. Going back to the survey itself, once a customer  
25 was taken to the viewing area and shown the products, what

1 happened then?

2 A. Then they were asked a series of questions about  
3 the Walmart Backyard Grill products to see if they would  
4 mistakenly say that they think these are from Variety or  
5 Roses or have some kind of connection to Variety or Roses or  
6 some other Backyard Barbecue brand.

7 Q. I'd like to direct your attention, please, to  
8 Exhibit D-85 in your binder. Can you tell the jury what that  
9 is?

10 A. This is the questionnaire that was used for the  
11 survey.

12 MS. GARKO: Your Honor, we would move Exhibit D-85  
13 into evidence.

14 THE COURT: Received.

15 **(Defendant's Exhibit No. D-85 received into evidence)**

16 Q. (By Ms. Garko) Mr. Poret, if you could please turn  
17 to page 63 of that document. It starts on page 50.

18 A. Okay.

19 Q. Is this the page where the main survey starts?

20 A. Yes.

21 Q. And can you briefly just walk the jury through the  
22 key questions that the survey participants were asked.

23 A. Sure. The first significant question after they  
24 had been shown the Walmart products is question number 4,  
25 which is on the next page. And the question was, "Do you

1 believe that these products are sponsored, approved or  
2 authorized by any company or store, or do you not?"

3 Q. And what happened after they were asked that  
4 question?

5 A. If anybody said yes, then they went on to the next  
6 question, which is question 5 and asked them, "Which company  
7 or store do you believe that these products are sponsored or  
8 authorized by?"

9 So the folks taking the survey could give any  
10 answer they wanted, and if they named a store or a company,  
11 the interviewer was then instructed to probe them by saying,  
12 "Any others?" So they could keep giving as many answers they  
13 had until they indicated that they were finished naming any  
14 other companies or stores.

15 Q. So the survey respondents were given the  
16 opportunity to answer as many stores as they want?

17 A. Yes.

18 Q. As they wanted?

19 A. Yes.

20 Q. And could give any answer that they wanted in  
21 response?

22 A. Yes. They -- it was an open-ended so they could  
23 give -- they could say whatever they wanted.

24 Q. What happened next after they were asked question  
25 5?



1           A.     For people who named some companies or stores, they  
2 then went on to question 6, which says, "What makes you think  
3 that these products are sponsored, approved or authorized,"  
4 by whatever company or store they named. So this question  
5 was getting their reason for why they named any other company  
6 or store.

7           Q.     And again, this was completely open-ended?

8           A.     Yes.

9           Q.     They could say whatever they wanted?

10          A.     Yes.

11          Q.     After questions 4, 5 and 6 were the survey  
12 participants asked any more questions?

13          A.     Yes. There was a second question testing for  
14 confusion, which was question 8, which said, "Do you believe  
15 that these products are connected or affiliated with any  
16 other company or store, or do you not?"

17                 And the respondents who said, yes, I do, went on to  
18 question 9, which said, "Which other company or store do you  
19 believe that these products are connected or affiliated  
20 with?" And again, the interviewer wrote down whatever  
21 companies or stores they named and said to them, "Any  
22 others?" So that they could have a chance to give any other  
23 answers until they were finished.

24          Q.     And for those giving answers to question 9, what  
25 happened then?

1           A.     The same thing as before. They went on to this  
2 time question 10 and they were asked, "What makes you think  
3 that these products are connected or affiliated," with  
4 whatever they had named.

5           Q.     And again, this was completely open-ended?

6           A.     Yes.

7           Q.     Why did you ask the two different series of  
8 questions, first if the respondents believed the products  
9 were sponsored, approved or authorized by another company,  
10 and then also whether the products were connected or  
11 affiliated with any other company?

12          A.     So that the survey could test for both types of  
13 confusion and the respondents in the survey had a chance to  
14 name any companies or stores that they were confusing it with  
15 in either of these questions.

16          Q.     Did you ask the respondents anything about where  
17 they shopped?

18          A.     Yes. At the end of the survey they were asked  
19 another question, which was question 12, which said, "Which  
20 of the following stores, if any, have you shopped at in the  
21 past 12 months?" And the interviewer then read a list of a  
22 number of stores, including Roses and some other Variety  
23 Stores. And this way the people who took the survey could  
24 answer which of these stores that they have shopped at in the  
25 past 12 months and the interviewers wrote that down so that

1 we would know which of the people who took the survey were  
2 recent Roses' customers too.

3 Q. So this was after those participants had been asked  
4 the substantive questions in the survey, correct?

5 A. Yes, this was at the end after the name test was  
6 over.

7 Q. And had any of the respondents shopped at Roses or  
8 any of these other Variety Stores that we see here in  
9 question 12?

10 A. Yeah. About 75 percent of the people who took the  
11 survey had.

12 Q. I'm sorry, you may have said this earlier. How  
13 many people total took the survey?

14 A. 209.

15 Q. Mr. Poret, did you analyze all the responses that  
16 you got from these folks?

17 A. Yes.

18 Q. And what did you find?

19 A. I found that no one of the 209 people who took the  
20 survey had confused the Walmart Backyard Grill products with  
21 Variety or Roses because of the term Backyard.

22 Q. And what does that tell you?

23 A. It tells me that in the real world there's not a  
24 likelihood of confusion that people at Walmart who see these  
25 products do not mistakenly think that they come from Variety

1 or that there's some other connection to Variety's Backyard  
2 brand.

3 Q. Did any of the survey respondents name a Variety  
4 store in response to being shown the Backyard Grill products?

5 A. Yes. There were four of the 209 who named Roses in  
6 one of the questions, which is 1.9 percent of the survey.

7 Q. And did those folks provide a reason for why they  
8 said Roses?

9 A. Yes, they did.

10 Q. What sorts of reasons did they give?

11 A. They're reasons like they think -- they named Roses  
12 because of the quality of the product or because of the type  
13 of product it is; in other words, typical answers of people  
14 who are just guessing other stores that they know also sell  
15 inexpensive products or outdoor products.

16 Q. Could you please turn in your binder to Exhibit  
17 D-245.

18 A. Yes.

19 Q. What does Exhibit D-245 show?

20 A. These show the answers of why -- of the four people  
21 who named Roses when they were asked why did they think that  
22 these products had some connection to Roses. And what you  
23 expect in a survey is if someone is thinking that this is  
24 Roses because it says Backyard on it, that that's the answer  
25 they would give, but these people said, I think it was Roses

1 because it's cheap materials or because they know there's  
2 demand for grills or Roses carries outdoor products or lesser  
3 quality. So you can see from these answers that these are  
4 just people who -- which is typical in surveys -- are just  
5 speculating what store might sell low-priced grills and so a  
6 few people came up with Roses.

7 Q. So are these people confused?

8 A. No, they're not confused, because they're not  
9 making a connection to Roses because of the name Backyard;  
10 they're just speculating for other reasons.

11 MS. GARKO: Your Honor, we move D-245 into  
12 evidence.

13 THE COURT: Received.

14 **(Defendant's Exhibit No. D-245 received into evidence)**

15 Q. (By Ms. Garko) Was there anything else you looked  
16 at with respect to these four participants who named Roses?

17 A. Yes. I also -- I read all of the answers of the  
18 people who took the survey, and these four people not only  
19 named Roses, they all also named other stores. Like they  
20 also named Big Lots or K-Mart or Target. And that further  
21 shows that they're not naming other stores because they're  
22 confused about the brand name, they're just thinking to  
23 themselves what other stores out there sell grills like this,  
24 and so they're naming whatever other stores they think of  
25 just for random reasons.

1           Q.     Mr. Poret, did your survey account for the fact the  
2 customers may not know or have a reason to believe that  
3 Variety's Backyard is in fact owned by Variety or Roses?

4           A.     Yes, it did.

5           Q.     How so?

6           A.     Because people taking the survey could name  
7 anything they wanted. So even if they didn't know a Variety  
8 or Roses, if they saw this Backyard Grill product and they  
9 said to themselves, yeah, I think that's connected to some  
10 other company called Backyard Barbecue, they could have just  
11 answered Backyard Barbecue as their answer instead of Roses  
12 or Variety.

13          Q.     Did any of the respondents respond in that way?

14          A.     No. No one named Backyard Barbecue. There were  
15 seven respondents who just repeated the name Backyard Grill  
16 that they saw on the boxes and there was one that just  
17 answered Backyard.

18          Q.     And did you take a look at those responses?

19          A.     Yes, I did.

20          Q.     Could you please turn your binder to Exhibit D-247.  
21 What is this showing?

22          A.     These are the answers of the eight people who took  
23 the survey who gave the answer Backyard Grill, or Backyard in  
24 one instance.

25          Q.     And what do these reasons tell you?

1           A.     They tell us that they're just reading the name off  
2 the box or the grills and that's the reason that they named  
3 Backyard Grill. It's not that they're thinking of some other  
4 Backyard brand that they're confusing it with. They're just  
5 saying -- they named Backyard Grill and they're asked why and  
6 they're saying, Because I see that name on the box.

7           Q.     Are those folks confused?

8           A.     No.

9           Q.     Why do you say that?

10          A.     Because confusion means they're making a mistake in  
11 connection to some other store or some other brand that  
12 they've heard of before. These are just people saying, I  
13 think this is Backyard Grill because I'm reading the name on  
14 it right now and that's what I think it is.

15          Q.     And did you consider anything else with respect to  
16 these eight folks who responded Backyard Grill or Backyard?

17          A.     I also looked at whether these people had shopped  
18 at Roses and only two of these at the end of the survey  
19 answered that they shopped at Roses and the other six said  
20 they did not. So that also makes me think that these  
21 respondents for the most part could not have been making some  
22 mistaken connection to Roses.

23          Q.     So based on all the data that you looked at, Mr.  
24 Poret, what does your survey tell you about whether consumers  
25 who saw Walmart's Backyard Grill products were likely to

1 think they came from or were otherwise associated with  
2 Variety or Roses?

3 A. It's pretty simple. It tells me that Walmart  
4 customers who look at these products are simply not confused.  
5 They are not making a mistaken connection to Roses or Variety  
6 or any other Backyard brand. They just think Backyard Grill  
7 is the name they're seeing on this box and that's it.

8 Q. To what degree, if any, does your survey tell us  
9 whether people bought a Walmart Backyard Grill product  
10 thinking it was a Variety product?

11 A. It tells me that it's unlikely that that happened;  
12 that Walmart customers would not have been confused in that  
13 way.

14 Q. So just so we're clear, Mr. Poret, what's the total  
15 number of people who were confused when shown the Walmart  
16 Backyard Grill products --

17 A. Zero.

18 Q. -- thinking they were Roses' products?

19 A. Zero.

20 Q. Zero?

21 A. Yes.

22 MS. GARKO: I have no further questions.

23 THE COURT: Any cross?

24 MR. SHAW: Thank you, your Honor.

25 ///



**CROSS-EXAMINATION**

BY MR. SHAW

Q. Mr. Poret, the preliminary question, can you tell the jury what data or information, if any, did Walmart provide to you prior to you engaging in this survey that you conducted?

A. I don't even know -- I don't know at this time. I mean, I don't remember. I don't remember them giving me data that was really particularly significant to what the survey design was.

Q. Okay. So as you sit here today under oath, you can't say whether Walmart provided you with any data or information whatsoever; is that right?

A. Well, it's been several years since the survey so, yeah, that is the honest answer. I don't remember if they provided me any data.

Q. But as you testified today, you walked us through your entire survey and there's no data within that survey that you can recall that would have been significant to your survey or the findings from your survey; is that correct?

A. I guess I didn't understand what you just meant.

Q. Is there any data that you just testified to that would have been incorporated into your survey that would have come from Walmart?

A. Well, my job was just to do a survey, so I did a

1 survey and the data I just talked about is data that I  
2 collected. It's nothing that came from Walmart.

3 Q. Walmart provided you, I guess, the sample products,  
4 of course, right? That's -- those are actual products  
5 obviously?

6 A. Yes.

7 Q. They provided you access to their stores. That's,  
8 I guess, not information or data, but they provided you that.  
9 And there's nothing else you can think of?

10 A. There's nothing I can think of off the top of my  
11 head.

12 Q. Okay. Did you know that Walmart had sold  
13 approximately 110 million products of the Backyard Grill  
14 products?

15 A. I don't know what the sales amount was.

16 Q. Even as of today you don't know that?

17 A. No.

18 Q. Your survey consisted of 209 participants; is that  
19 right?

20 A. Yes.

21 Q. That doesn't seem like enough participants when the  
22 products -- when there's 110 million products sold, does it?

23 A. No, that's not right. It is. It's just a matter  
24 of basic statistics. 209 is plenty of a sample size.

25 Q. Is there some particular reason that you selected

1 209? Was there some threshold that -- was the number 200  
2 significant in some way?

3 A. Well, 200 is what I was essentially planning on and  
4 just naturally it went over a little bit.

5 Q. Okay. So 200 was sort of your minimum base that  
6 you could say with reliability that the survey would measure  
7 what it sought to measure; is that right?

8 A. It's not right that it was a minimum. It's right  
9 that it's what I was aiming for.

10 Q. You made the decision that 200 was the number you  
11 were aiming for?

12 A. Yes.

13 Q. And you're an experienced trademark survey expert?

14 A. Yes.

15 Q. Okay. So you wouldn't have felt comfortable if you  
16 had, like, 199 participants?

17 A. No, that's not true. I would have felt  
18 comfortable.

19 Q. Just as comfortable as if you had 209?

20 A. Well, given the results, zero out of 199 versus  
21 zero out of 209 wouldn't make any difference to me.

22 Q. Well, if you would have gone and conducted your  
23 research and you would have only had -- let's take a better  
24 example. Say you had less than 100 people, would you have  
25 still gone forward and conducted the survey?

1           A.     I don't understand your question.

2           Q.     If there was less than 100 participants that  
3 qualified for your survey, would you have felt comfortable  
4 conducting the survey that you conducted?

5           A.     Well, the correct answer to that question is it all  
6 depends on what the results were. The only relevance of how  
7 many people are in the survey is what kind of margin of error  
8 there is. And, in fact, if 100 -- as it turns out, 100 would  
9 have been enough if zero were confused because there would be  
10 such a low margin of error. But going into the survey, of  
11 course, I didn't know if people -- what the rate of confusion  
12 would be, so I was aiming for a number of 200 that would have  
13 been good enough no matter what the result was.

14          Q.     So the higher the sample size -- if you have a  
15 thousand people versus 100 people, how does that affect the  
16 margin of error?

17          A.     The margin of error goes down the more people you  
18 have. However, it also depends on what the result is. So if  
19 you have a result that's very, very low, like zero percent or  
20 one percent, the margin of error is low no matter what. If  
21 you have a result more like 50 percent, then the margin of  
22 error is higher and you have a bigger sample size to make the  
23 margin of error go down.

24          Q.     Okay. Got it. So it's fair to say that the margin  
25 of error is higher if it's less than 100 people and the

1 margin of error is lower if it's above, say, a thousand  
2 people, correct?

3 A. That would be true of any two numbers that you  
4 said.

5 Q. Correct. I'd like to show you a document -- it's  
6 already been introduced into evidence, it's Defendant's  
7 Exhibit No. 53 -- and ask you if you have seen this document  
8 or been provided any information.

9 So take a look here if we can, Mr. Poret, if you  
10 can read that. I'm going to -- I'll read it to you and it  
11 says, "Clearly communicating the features is important to  
12 selling to the predominantly male buyer." Do you see that?

13 A. Yes.

14 Q. Were you aware that the Walmart consumers of this  
15 product were predominantly male?

16 A. I didn't have any assumptions about that one way or  
17 the other.

18 Q. Well, Mr. Poret, you have heard testimony from  
19 Walmart prior to today that the customers were predominantly  
20 male; isn't that true?

21 A. I don't know.

22 Q. Well, Mr. Poret, you heard Mr. Kovach -- you were  
23 in the courtroom when Mr. Kovach testified in a prior hearing  
24 and he said that the customers were predominantly male. You  
25 were in that courtroom, were you not?

1           A.     If you mean something several years ago, you might  
2     be right, but I have no idea at this point.

3           Q.     Two years ago.

4           A.     If you're asking do -- I don't even know who that  
5     person that you're naming is. I certainly don't have any  
6     idea what they said two years ago, but if you say they did --

7           MR. SHAW: May I approach, your Honor?

8           THE COURT: Sure.

9           (Attorney Shaw providing transcript to the witness)

10          Q.     (By Mr. Shaw) Mr. Poret, I've handed you a copy of  
11     a transcript that will hopefully refresh your recollection as  
12     to what Mr. Kovach said in the courtroom under oath in which  
13     you were present. Does that refresh your recollection?

14          A.     No. I just don't remember what happened two years  
15     ago in a courtroom. But I see the words here, so I'm sure  
16     you're right about it.

17          Q.     Do you see the words where it says the witness  
18     testified the customers are predominantly male? Do you see  
19     that? Line 16.

20          A.     I see it says predominantly male, but she, I guess  
21     meaning women, have a big say in the spend, so I take this to  
22     mean a lot of the customers are male, but the women have a  
23     big role in the decision about what is being purchased.

24          Q.     Do you also see the line 20 and 21 where it says  
25     ages 35 to 50 are the predominant customers for this product?

1 A. Yes.

2 Q. Okay. I'll take that from you.

3 (Attorney Shaw retrieving transcript)

4 Q. Your survey wasn't limited to customers age 35 to  
5 50, was it?

6 A. No, it wasn't only that age range.

7 Q. And your survey was not limited only to males, was  
8 it?

9 A. No, it wasn't.

10 Q. Are you able to, with the exhibits you have in  
11 front of you, tell me of the 209 how many -- if we remove  
12 everyone out of these categories, how many were males age 35  
13 to 50? Do you have that number in front of you?

14 A. No. That's not in the materials sitting right  
15 here.

16 Q. Okay. You prepared a report in this case; is that  
17 correct?

18 A. Yes.

19 Q. I'm going to hand you a document.

20 MR. SHAW: If I may, your Honor.

21 (Providing documents to the witness)

22 Q. There's two sets of page numbers, Mr. Poret, on the  
23 bottom of this document. And the far bottom is 34 of 84. If  
24 you could turn there.

25 A. Okay.

1           Q.     You can take my word for it or do the math, but it  
2 appears that if you do the math, that 72 participants fall  
3 into the age range of 35 to 50.

4           A.     Okay.

5           THE COURT:   But your point is that they're still  
6 not confused, right?  Whether it's 72 or 209, zero were  
7 confused.

8           THE WITNESS:  Right.  That's correct.  And zero out  
9 of 72 and zero out of 209 --

10          THE COURT:   Is still zero.

11          THE WITNESS:  -- is still zero and the margin of  
12 error is still --

13          THE COURT:   Zero.

14          THE WITNESS:  -- essentially zero because it's such  
15 a low result.  It's like if you flipped a coin 72 straight  
16 times and it came up heads every time, you're pretty darn  
17 sure --

18          THE COURT:   It would still be a 50/50 chance every  
19 time.

20          THE WITNESS:  Right.  And if you did something 72  
21 times and it comes up with the same result every time, you've  
22 got your answer.  You don't need to do it another 130 times.

23          THE COURT:   Okay.  We get it.

24          Q.     (By Mr. Shaw)  Mr. Poret, if you were to survey --  
25 conduct a survey as to someone with respect to nail polish,



1 I'm assuming you wouldn't include males in that survey, would  
2 you?

3 A. With respect to nail polish?

4 Q. Correct.

5 A. You're likening nail polish to grills? You're  
6 probably right. I probably wouldn't survey men for nail  
7 polish. But I think women's roles in picking out grilling  
8 and grilling accessories is a lot more significant than  
9 males' roles in picking out nail polish.

10 Q. Mr. Poret, let me show you a document, if I can put  
11 it on here. This, I believe, is Exhibit 83, and it's a copy  
12 of your CV that you testified to on direct?

13 A. Yes.

14 Q. And you said on direct that was a true and correct  
15 copy of your CV, correct?

16 A. Yes, at the time that this report was submitted.

17 Q. Correct. You mean you'd update it now with further  
18 information if you had to?

19 A. Well, it's -- yes. That's two or three years old,  
20 but it's -- there's nothing inaccurate about it.

21 Q. As of that date it was accurate, the day you  
22 prepared the report?

23 A. Yes.

24 Q. Okay. So generally the CV lists education, lists  
25 your employment history, things of that nature?

1           A.     Yes.

2           Q.     Work history?

3           A.     Yes.

4           Q.     Okay.  And I looked at your CV and it lists your  
5 education, looks like, going back to 1998; is that right?

6           A.     Well --

7           Q.     Sorry, your employment -- wait.  Education to '98  
8 -- or '93, sorry.

9           A.     Yes.  My college degree is from '93, so it goes  
10 back to '93.

11          Q.     And the employment went back to '98 I saw in the  
12 full copy we had, right?

13          A.     Yes.

14          Q.     And your work history, I believe, it's on another  
15 page I can show you later, goes back to 2011, correct?

16          A.     No.  This is showing my work history back to '98 as  
17 of the end of my last education program.

18          Q.     I'm showing you what I have here is your prior  
19 experience in cases going back to 2011.

20          A.     Okay.

21          Q.     Your work history though is false, isn't it, your  
22 employment history?  Isn't that not true?

23          A.     No, it's not false.

24          Q.     Mr. Poret, isn't it true you worked for a company  
25 named Guideline in 2004?

1           A.     Yeah. Guideline changed its name to ORC. So it's  
2 the same thing, just Guideline changed its name partway  
3 through my employment.

4           Q.     Where it says ORC here, ORC is formerly Guideline?

5           A.     Well, it could have said ORC, formerly Guideline,  
6 or three or four other names that it went through, but it's  
7 the same company. It just doesn't explain on that line that  
8 it changed its name from Guideline to something else to  
9 something else.

10          Q.     You didn't remove Guideline to, for example, hide a  
11 case in between that timeframe of 2004 to 2011 where your  
12 work history doesn't go beyond that?

13          A.     No.

14          Q.     You weren't trying to hide the case you worked on  
15 for the plaintiff called Muscle Milk in a prior case?

16          A.     I wasn't hiding anything. I was doing what the  
17 rules for the CV say, which is to show the last four or five  
18 years of the cases that you've worked on. So that's why the  
19 CV at that time showed cases from 2011 to 2015 or '16 or  
20 whatever the period of time is.

21          Q.     Do you recall the case I just mentioned to you  
22 about Muscle Milk?

23          A.     Yes.

24          Q.     And you testified in that case in 2009, correct?

25          A.     That seems right.

1 Q. And that was -- was the company then named  
2 Guidance?

3 A. Who?

4 Q. Guidance? That was the former ORC name, Guidance,  
5 when you worked for Muscle Milk?

6 A. It used to be called Guideline.

7 Q. The CV I showed you was the CV that you had  
8 submitted in the case for Muscle Milk.

9 A. Okay.

10 Q. I want to talk to you just very briefly about that  
11 case. You testified again for the plaintiff, right?

12 A. Yes.

13 Q. So Muscle Milk was the brand and it was accusing a  
14 company called Muscle Power of trademark infringement,  
15 correct?

16 A. I don't think that's exactly correct, but you're  
17 talking about stuff going back to 2007 to 2009. So I don't  
18 have the clearest memory of it, but I do think it involved --

19 Q. Let me show you to help refresh your memory on a  
20 few of the details.

21 (Providing documents to the witness)

22 Q. Does that refresh your memory of the facts a little  
23 bit as you're flipping through it?

24 A. Well, I haven't gotten a chance to look at it much,  
25 but I do have a general recollection of what this was about

1 in this survey.

2 Q. And you have a recollection that your findings in  
3 that case favored the defense -- sorry, the plaintiff in that  
4 case in finding that there was, in fact, infringement,  
5 correct?

6 A. It is correct that the survey found that there was  
7 confusion between the Muscle Milk and Muscle Power protein  
8 drinks.

9 Q. Do you recall the survey format that you used in  
10 that case?

11 A. Yes. It was a line-up survey. It took a number  
12 of -- these were all protein drinks that are sold together in  
13 coolers in convenience stores like 7-Eleven or other places  
14 and I'm sure you've seen -- you go into the cooler and  
15 there's a whole bunch of protein drinks there. So this was a  
16 survey that simulated people coming across a number of these  
17 protein drinks and seeing if people thought any of them were  
18 part of the same brand or the same company. So it asked  
19 whether any of these various protein drinks in the survey  
20 were from the same company.

21 Q. So, Mr. Poret, just to show the jury what we're  
22 talking about, this was the product in that case, correct?

23 A. That was --

24 Q. The plaintiff. That's the plaintiff's product,  
25 right?

1           A.     Yes.

2           Q.     And the -- and what you did in that survey before  
3     you conducted any type of questions is you showed the survey  
4     participants a picture of that product, correct? Yes, right?  
5     You showed the participants -- you exposed them to the  
6     product?

7           A.     Yes. They saw the product. They saw an actual  
8     product, not a picture.

9           Q.     And it was so you would -- so that you would  
10    simulate an actual marketplace experience and they would see  
11    the product first and then they would compare the product --

12           MS. GARKO: Objection, your Honor.

13           THE COURT: Sustained. This line of questioning is  
14    forbidden. Go ahead. If you've got any other cross, you'd  
15    better do it.

16           Disregard those questions.

17           Q.     (By Mr. Shaw) Mr. Poret, you testified just a  
18    moment ago that the line-up survey was an appropriate survey  
19    method for testing likelihood of confusion, right?

20           A.     I don't know if I did, but it is appropriate when  
21    it's used in the right circumstances.

22           Q.     So in this case, in this survey, you did not expose  
23    the participants to Variety's Backyard Barbecue product  
24    before conducting the survey, correct?

25           A.     Right.

1 Q. And you never exposed them to the company Roses,  
2 did you?

3 A. Right. You're correct.

4 Q. Never exposed them to the company Variety, did you?

5 A. Right.

6 Q. Okay. You understand this case is about  
7 infringement of the Backyard Grill, the brand name?

8 A. I understand.

9 Q. Okay. Is it fair to say your survey had a built-in  
10 assumption that the participants had been previously exposed  
11 to the Variety Backyard branded products?

12 A. No.

13 Q. Was it an assumption you made that the participants  
14 were aware of the Backyard -- Variety's Backyard branded  
15 products?

16 A. No.

17 Q. Was it assumed that the participants knew that  
18 Variety owned a trademark for The Backyard?

19 A. No.

20 Q. Your questions then when you proceeded to show them  
21 only the Walmart's product asked them about which company or  
22 store; is that correct?

23 A. Yes.

24 Q. The survey was conducted inside Walmart?

25 A. Yes.

1           Q.     They were surrounded by Walmart products in the  
2 store?

3           A.     Walmart and lots of other brands.

4           Q.     In fact, the Walmart products you were actually  
5 showing them had the word Walmart on them, didn't it?

6           A.     I'm not sure. They might have.

7           Q.     We have the products here, but I'll show you a  
8 demonstrative. This is a scan label on the actual product  
9 that we have here. What does that say on there? It says,  
10 "Backyard Grill is a trademark of Walmart Stores, Inc." Has  
11 Walmart.com on there. The top is, "Distributed by Walmart  
12 Stores, Inc." Do you see that?

13          A.     Yes.

14          Q.     You understand those appear on the actual boxes,  
15 right?

16          A.     Yes.

17          Q.     And then after all this, you then asked the  
18 participants which company or store these products are  
19 associated with?

20          A.     That isn't what the question was.

21          Q.     Okay. Well, essentially you're asking the  
22 participants inside a Walmart store whether these companies  
23 are sponsored or approved by anyone other than Walmart,  
24 correct?

25          A.     That's not what the question was.



1           Q.     Isn't that what you're trying to get at though for  
2     confusion?

3           A.     I did ask questions that gave people the  
4     opportunity to name any other store or brand or company that  
5     they thought these were affiliated with or sponsored or  
6     approved by or connected with.

7           Q.     But you didn't give them the opportunity prior to  
8     know about Variety's product and Variety's brand?

9           A.     Well, real life gave them the opportunity to.

10          Q.     But you assumed they knew?

11          A.     No, I didn't. I'm trying to test what happens in  
12     the real world. And in the real world some people in Walmart  
13     have already heard of Variety's brands and know Roses and  
14     some don't.

15          Q.     Well, in other formats you've conducted surveys  
16     for -- in other cases you've asked the participants -- rather  
17     than asking them like in this case about coming into the  
18     store, you've asked them what company or brand sponsors or  
19     produces this product. You've done that before, correct?

20          A.     I've definitely used the word "brand" in some  
21     surveys, and I've used the word "store" in some surveys, and  
22     I've used both.

23          Q.     Have you conducted post-sale confusion surveys in  
24     your experience?

25          A.     Yes.

1 Q. And you did not do that in this case, did you?

2 A. No.

3 Q. Post-sale, in other words, would be outside of the  
4 store in the general -- in a backyard, for example, so to  
5 speak whether consumers visiting another friend or tailgating  
6 would notice one product versus another and think they're  
7 affiliated with one another. That's not the type of survey  
8 you conducted here, right?

9 A. Right.

10 Q. And in your survey, I think you mentioned on direct  
11 that there was about four participants who named Roses and  
12 eight who mentioned Backyard, correct?

13 A. Yes.

14 Q. And that according to my math and declaration you  
15 submitted is about 5.7 percent, correct?

16 A. Yes.

17 Q. And I know you don't know or you didn't know that  
18 about 110 million products were sold, but if you do the math,  
19 that would be about 6.2 million people. That would be 5.7  
20 percent of 110 million. About 6.2 million, correct?

21 A. I don't know.

22 MR. SHAW: Nothing further, your Honor.

23 MS. GARKO: I have no more questions.

24 THE COURT: You can step down.

25 THE WITNESS: Thank you, your Honor.

1 (Witness Excused)

2 THE COURT: Do you have any other witnesses?

3 MR. LONG: Call George Mantis, your Honor.

4 **GEORGE MANTIS**

5 having been duly sworn, testified as follows:

6 THE WITNESS: I do.

7 **DIRECT EXAMINATION**

8 BY MR. HOSP:

9 Q. Good afternoon.

10 A. Good afternoon.

11 Q. Would you introduce yourself to the jury, please.

12 A. My name is George Mantis.

13 Q. What do you do for a living?

14 A. I am the president and founder of the Mantis Group,  
15 which is a survey research and consulting firm.

16 Q. Were you asked to do some survey work in connection  
17 with this case?

18 A. I was.

19 Q. Now, you were out of the room, but the jury just  
20 heard a description of a survey that Mr. Poret surveyed where  
21 you were trying to determine whether or not people who saw  
22 Walmart products would think that they were Variety's  
23 products. Is that in this case what would normally be called  
24 a forward survey, a forward confusion survey?

25 A. That's correct.

1 Q. And what kind of survey did you perform?

2 A. I did a study to assess reverse confusion. And  
3 that being whether consumers now believe Variety products are  
4 made or put out by Walmart.

5 Q. And if you would, Mr. Mantis, just speak up a  
6 little bit. It's a little hard to hear over here. The sound  
7 gets swallowed.

8 Before we get into the specifics of that survey --  
9 and we're going to cover those specifics very quickly because  
10 I know that it's getting late for everybody -- can you just  
11 explain to the jury a little bit about your educational  
12 background and your experience that gives you the expertise  
13 in order to make these expert opinions.

14 A. I received a Bachelor of Science degree, a Master's  
15 of Business Administration and a law degree. I've worked in  
16 the field for in excess of 40 years and have conducted and  
17 reported on well over a thousand studies.

18 Q. And have your expert opinions been accepted in  
19 courts before?

20 A. Yes.

21 Q. Have you ever been excluded as an expert before?

22 A. No.

23 MR. HOSP: Your Honor, we offer this witness as an  
24 expert in survey design.

25 THE COURT: All right. He'll be an expert.

1 Q. (By Mr. Hosp) Can you describe just at a very high  
2 level what it is that you did to conduct this survey.

3 A. Included in the survey are responses from 121  
4 individuals that were pre-recruited and invited to  
5 participate in a survey in a central location. So it was a  
6 face-to-face interview.

7 Q. And what did you do then?

8 A. The first thing that was done was to determine  
9 whether individuals were qualified to be part of our survey.  
10 So they were asked a series of screening questions.

11 Q. Okay. And just so that we can speed this along,  
12 did you do this survey in accordance with accepted survey  
13 process?

14 A. Yes.

15 Q. Okay. Now, I'd like to get to the meat of the  
16 survey. If you would, take a look at Exhibit D-76 and tell  
17 the jury what that is.

18 A. This is the appendix to the report that I provided  
19 for this hearing.

20 Q. Okay. And if you kept going in this exhibit, does  
21 it also include the substantive questions that you asked?

22 A. Yes.

23 Q. And if you turn to page 51 through 54, 55, is this  
24 what you showed the individuals who took the survey?

25 A. Yes. When questioned, individuals that took the

1 survey -- which we call respondents -- were facing this  
2 product display, encompassing a toolset, a barbecue grill,  
3 corn skewers, and a grill cover.

4 Q. And these are Variety Backyard Barbecue products;  
5 is that right?

6 A. That is correct.

7 Q. Okay. Now, Mr. Poret has described in his survey  
8 where he walked through a series of three sets of questions  
9 asking them whether they believed a particular company put  
10 out or made the product, whether or not they thought it was  
11 affiliated. Is that the same sort of format basically that  
12 you used here?

13 A. Yes. The three-question format has been widely  
14 accepted as tracking confusion as defined by the governing  
15 law in trademark infringement.

16 Q. All right. Now I'd like to turn right to the  
17 results of the survey. And if you would look at DDX-4 --  
18 actually before we put that up, can I ask you just generally,  
19 how many people did you survey?

20 A. 121.

21 Q. And of those, how many of those gave answers to  
22 your questions that evidenced some kind of confusion that  
23 could actually be tied to the use of the Backyard Barbecue  
24 name?

25 A. Two out of the 121.

1           Q.     And what percentage of the overall population that  
2     you surveyed does that represent?

3           A.     1.7 percent.

4           Q.     And to your knowledge you've been -- for how long  
5     have you been an expert in survey methodology?

6           A.     42 years.

7           Q.     And in your -- do you have an understanding of what  
8     level of percentage of confusion you generally have to meet  
9     in order to show any kind of confusion whatsoever?

10          MR. ADAMS:  Objection.  Calls for a question of  
11     law.

12          THE COURT:  Overruled.

13          A.     Yes.  Generally what's been reported in treatises  
14     and how courts have analyzed whether confusion exists, levels  
15     of 15 percent or higher corroborate a finding of confusion.  
16     Levels below that may or may not in some cases.  Certainly  
17     1.7 percent is insufficient to establish confusion.

18          Q.     (By Mr. Hosp)  Are you aware of any circumstance  
19     where a finding of less than ten percent has not been held to  
20     find no confusion?

21          A.     No.  In fact, ten percent or lower, the conclusion  
22     drawn is that there is no likelihood of confusion.

23          Q.     Okay.  Now, did only two people actually mention  
24     Walmart in any way?

25          A.     No, there were nine in total that mentioned

1 Walmart.

2 Q. Okay. And why is it that you don't consider seven  
3 of those nine to be confused?

4 A. I looked at response to what we call an open-ended  
5 question. Whenever a respondent mentioned a company or store  
6 or brand, we asked them why they said that. And that type of  
7 question is, in many cases, the most illuminating part of the  
8 survey, because we can look into, for example, a window into  
9 how we as consumers think. And it provides evidence that  
10 goes beyond merely statistical evidence. So I reviewed the  
11 responses to the why question, what makes you say that, and  
12 categorized responses based on what the respondent actually  
13 said.

14 Q. So to be clear, you actually took down exactly what  
15 it is that the individuals responding to these questions  
16 said; is that right?

17 A. That is correct. These are verbatim responses.

18 Q. All right. And if you would, turn to table 4 in  
19 DDX-4. And I'd just like you to walk through -- let's leave  
20 the whole thing up. I think it's probably big enough. I'd  
21 just like you to walk through a few of these responses and  
22 explain to the jury why it is that you don't believe these  
23 individuals should be classified as expressing confusion over  
24 the name Backyard Barbecue.

25 A. Well, none of these respondents -- none of these



1 five respondents mentioned Walmart for the name Brickyard  
2 (sic) as the cause of their belief that Walmart puts out  
3 these products.

4 Q. Sorry, go ahead.

5 A. In four out of the five, respondents are indicating  
6 more than one source. For example, respondent 69, in  
7 addition to Walmart, the individual indicates Home Depot,  
8 Sam's, Costco, which is an indication that these individuals  
9 are simply associating grilling products with stores like  
10 Sam's and Costco, not because of the name Brickyard. Again,  
11 the purpose of our study is to determine whether the name or  
12 mark Brickyard is the cause of confusion.

13 Q. Okay. And would you say that that's true for all  
14 of these five?

15 A. Yes.

16 Q. Now, there's another table -- if we could turn to  
17 table 3. These are individuals who you indicate should not  
18 be considered actually confused because they only show  
19 possible confusion; is that right?

20 A. That is correct.

21 Q. Can you explain what you mean by that, please.

22 A. The best way to explain it is would be by example.  
23 For example, respondent 43 says, I guess it could be Walmart.  
24 That shows a mere possibility of confusion. The test is  
25 probable confusion. The possibility of confusion is

1 insufficient to categorize any response as a confused  
2 response.

3 Q. And just so that -- well, let's go to table 1 in  
4 this. Here you see that Walmart has a total of nine  
5 mentioned, but as you've already testified, only two of those  
6 actually show confusion; is that right?

7 A. That is correct.

8 Q. Now, where does Walmart fall in terms of number of  
9 mentions for where these stores are with other stores?

10 A. Well, an equal number mention K-Mart, slightly  
11 higher number mention Dollar General, Family Dollar and Big  
12 Lots, all of which do not sell grilling products bearing the  
13 Brickyard name. So it's obvious that these individuals are  
14 associating grilling products with stores like a K-Mart or a  
15 Dollar General and not because of the Brickyard name.

16 Q. Okay. And looking at that -- the total number of  
17 nine, it says percentage of all respondents. So is that the  
18 total percentage that nine represents of the 129 you  
19 surveyed?

20 A. Of the 121, that's correct. 7.4 percent.

21 Q. So even if you said, you know what, even those  
22 people who said, I'm just going to guess Walmart, if you  
23 included those all together, does that still show an absence  
24 of confusion?

25 A. Yes.

1 Q. Now, based on the questions that were just asked  
2 earlier, it's likely that you're going to be asked on  
3 cross-examination that if there were 100,000 people who  
4 actually purchased these products, doesn't that mean that  
5 7,400 were actually confused. Would that be accurate?

6 A. No. Surveys by definition are experiments. We are  
7 trying to determine the cause of an association, in this  
8 case, whether Brickyard is driving a Walmart response. We  
9 can only infer what could happen in the actual marketplace.  
10 So the study is not designed as a point estimate, if you  
11 will, to determine how many people actually go into -- in  
12 this case -- a Variety store, purchase a product in the  
13 belief that it's Walmart.

14 Q. And again, in your 40 years of experience of doing  
15 these surveys, what does any result under ten percent  
16 indicate?

17 A. Lack of confusion.

18 MR. HOSP: Nothing further, your Honor.

19 THE COURT: Any cross?

20 MR. SHAW: Briefly.

21 **CROSS-EXAMINATION**

22 BY MR. SHAW:

23 Q. Just as an initial matter, Mr. Mantis, I think you  
24 were testifying and mentioning the word "Brickyard." You  
25 understand the term trademark here is Backyard?

1           A.     Backyard, excuse me.

2           Q.     You testified that you've never had a survey or  
3     report excluded by any court?

4           A.     That's correct.

5           Q.     You testified that on direct, right?

6           A.     Yes.

7           Q.     You have had a survey severely criticized and  
8     rejected by the court; is that correct?

9           A.     Can you give me a reference or --

10          Q.     Do you recall the case in Chicago, Illinois, it was  
11     AJ Canfield v. Vess Beverage Company. Do you recall that  
12     case?

13          A.     Oh, yes, about 35 years ago or so when the  
14     protocols for conducting a secondary meaning study were not  
15     established. I do recall that.

16          Q.     Do you recall the comments about the survey in that  
17     case having obvious flaws and conceptual relation being  
18     absurd and defying common sense? Do you recall the Court  
19     criticizing your survey?

20          A.     I don't recall precisely what the Court said.

21          Q.     That was a survey you conducted in about a 12-hour  
22     time span, correct?

23          A.     That is correct.

24          Q.     And it was determined that no probative value could  
25     have been drawn from your conclusions in that survey,

1 correct?

2 A. Yes. The survey compared or asked respondents to  
3 compare two names on the beverage can, if I recall. And this  
4 goes back, what, Counselor, 30 years ago, maybe 35. It was  
5 not designed to measure secondary meaning even though the  
6 protocols 30 years ago were not established. What counsel  
7 offered the survey for was out of my control. This was just  
8 an indication that people could distinguish between a brand  
9 name and another name.

10 Q. In that case in which your survey was severely  
11 criticized and rejected, you were testifying for the defense;  
12 is that right?

13 A. I really don't recall.

14 Q. But was 12 hours just too sufficient of a time in  
15 your opinion to conduct that survey that you offered in that  
16 case?

17 A. You have to look at it how the survey was  
18 conducted. This was a brief intercept in a public walkway in  
19 Chicago where literally hundreds of people walked by per  
20 minute. So you can get a sufficient number of respondents  
21 relatively quickly.

22 Q. The respondents or the participants in this case  
23 that you interviewed were both male and female, correct?

24 A. Pardon?

25 Q. Male and female participants in this survey?

1 A. Yes.

2 Q. And about 121 individuals?

3 A. That's correct.

4 Q. And you didn't weight it more heavily towards males  
5 even though the products here are predominantly  
6 male-dominated products?

7 A. It wasn't weighted. These individuals were just  
8 randomly selected. That qualified.

9 Q. And if you look at your Exhibit D-76 on page 48,  
10 that's where it has the breakdown of 57.9 percent female and  
11 42 percent male, right?

12 A. I'm not with you yet, Counselor.

13 Q. Sorry.

14 A. (Continuing to peruse exhibit). Okay.

15 Q. Okay. My reading is correct it was 57 percent --  
16 virtually 58 percent were female, right?

17 A. Correct.

18 Q. And if we were to subtract the -- I know you have  
19 the age group there. If we were to subtract those people  
20 that were 35 or younger, you would be left with less than 50  
21 people for the survey, correct?

22 A. If you were to --

23 Q. Remove individuals that were in the age group  
24 below -- you have 35 to 49, 50 and older, and 21 to 34. If  
25 we remove the 33 individuals from the 21 to 34 age group,

1 we'll be left with somewhere below 50 people?

2 A. That's correct.

3 Q. I know you weren't in the courtroom when Mr. Poret  
4 testified, but you know Mr. Hal Poret, correct?

5 A. I recently met Mr. Poret.

6 Q. And would you agree with Mr. Poret that an  
7 essential characteristic of a likelihood of confusion survey  
8 is to set it in somewhere that replicates the marketplace as  
9 closely as possible?

10 A. As a general proposition that is absolutely  
11 correct.

12 Q. Your survey was conducted where, an office space  
13 somewhere?

14 A. No. I use that nomenclature. It was conducted  
15 obviously in an office setting, which is a research firm in  
16 Raleigh, North Carolina.

17 Q. That's the research firm that you used that fields  
18 your surveys. You're not actually there when it's fielded,  
19 that's who you contract out with?

20 A. I was not there, but I retained an individual  
21 independent of my company and independent of L&E Research to  
22 be on site to train the interviewers and to monitor the  
23 interview.

24 Q. It's fair to say though that research facility is  
25 not an actual commercial marketplace where consumers go and

1 shop, right?

2 A. No. It's a research facility.

3 Q. In looking at the actual products that you showed  
4 to consumers, in particular the barbecue toolset, it appears  
5 there is like a tag or label on the actual product; do you  
6 see that? Do you have that?

7 A. What page are you on?

8 Q. I don't know if you have it in front of you. Do  
9 you recall -- I know you weren't there, but do you recall  
10 that the barbecue set had an actual price tag on it, a Roses  
11 price tag?

12 A. Yes.

13 Q. And the Roses price tag, of course, indicates the  
14 source being Roses, right?

15 A. There is no indication that Roses is on the price  
16 tag.

17 Q. Your survey resulted -- if you take the percentage  
18 of individuals that you had for I guess the two percent  
19 confusion and if you multiply that by the consumer, you're  
20 probably going to have over 100,000 individuals, right?

21 A. I don't know what base you're making the  
22 multiplication on.

23 Q. Well, if you were to take the number of Variety  
24 products sold with the Backyard Barbecue trademark and  
25 multiply that by the percentage in which you have confusion,



1 you'll come up with a net result of an actual number of  
2 confusion of consumers?

3 A. I still am not tracking what you're getting at.

4 Q. You don't have the actual number -- you don't know  
5 how many Variety products were sold with the Backyard  
6 Barbecue trademark, right?

7 A. That's correct.

8 Q. So we can't do the actual math. But if we were to  
9 do the math, we would take the percentage of confusion and  
10 multiply it by the total number of products sold to get our  
11 answer, right?

12 A. Yeah. If you were to misuse the purpose of doing  
13 the survey. The purpose here is to get an estimate of what  
14 causes individuals to have a mistaken belief that Variety  
15 products are put out by Walmart. The purpose of the survey  
16 is not a point estimate to measure how many people in the  
17 actual marketplace are confused.

18 Q. Well, even if you had one or two and your job is  
19 constructing the survey to mimic the marketplace, isn't that  
20 as close of a real-world example of confusion you're ever  
21 going to get, even if you just have one?

22 A. One or two what?

23 Q. One or two individuals that are confused.

24 A. And your question?

25 Q. Isn't that -- if your survey, as you testified, is

1 a real example of a marketplace replication of what a  
2 consumer is going to experience, even if one or two or three  
3 are confused, isn't that -- isn't confusion confusion?

4 A. Well, I think I mentioned this on direct. We can  
5 only infer what would occur in the marketplace. A survey is  
6 not designed to measure how many people actually purchased a  
7 product under a mistaken belief. That would be a test of --  
8 a shopping test, if you will.

9 Q. I understand your testimony. You're testifying on  
10 behalf of Walmart and presuming you're getting compensated  
11 for your testimony?

12 A. Yes, as all experts are compensated, yes.

13 Q. Thank you, Mr. Mantis. I don't have any further  
14 questions.

15 THE COURT: That it?

16 MR. LONG: Nothing, your Honor, but we would move  
17 into evidence D-76 and DDX-4, please.

18 THE COURT: All right. They'll be received.

19 **(Defendant's Exhibit Nos. D-76 and DDX-4 received into**  
20 **evidence)**

21 THE COURT: Thank you. You can step down.

22 THE WITNESS: Thank you.

23 (Witness Excused)

24 THE COURT: Do you have any other witnesses?

25 MR. LONG: Yes, your Honor. Sequestered --

1 THE COURT: You have another witness?

2 MR. LONG: Yes, we do.

3 THE COURT: We'll take a recess, a short afternoon  
4 recess.

5 (Jury out at 3:36 p.m.)

6 (Recess at 3:36 p.m. to 3:53 p.m.)

7 (Jury in at 3:53 p.m.)

8 (Open Court)

9 MR. LONG: Your Honor, before calling the next  
10 witness there is housekeeping. We offer 247.

11 THE COURT: It will be received.

12 **(Plaintiff's Exhibit No. 247 received into evidence).**

13 MR. SHAW: Your Honor, may we approach with a brief  
14 side bar?

15 THE COURT: Yes.

16 **BENCH CONFERENCE**

17 (On the Record)

18 MR. SHAW: Your Honor, this is the -- we understand  
19 it's a liability trial. We sent our damages expert home.  
20 This witness testified at the profits engorgement trial, he's  
21 the damages expert. He's here to testify that he didn't  
22 study -- the consumers don't purchase the products by the  
23 brand. That is cumulative.

24 THE COURT: They don't --

25 MR. SHAW: -- purchase the products based on the

1 brand name. Deshommes testified to that, Dineen testified to  
2 that. It's not worthy of expert testimony. It wasn't  
3 credible and it was common sense. He didn't say anything in  
4 this trial about confusion in their damages expert.

5 MR. HOSP: He's here to testify regarding the  
6 strength of the mark. He does a survey that shows people  
7 don't buy these products because of the mark. And they've  
8 moved twice to exclude him and those motions have been  
9 denied.

10 MR. SHAW: This is a liability phase. I understand  
11 he would testify in terms of -- in terms of the damages  
12 trial.

13 THE COURT: We're not going to get into damages.

14 MR. SHAW: That's the only purpose that his  
15 testimony is being offered for. There is no purpose -- this  
16 has --

17 THE COURT: You said you're offering it for --

18 MR. HOSP: Strength of the mark --

19 MR. SHAW: That's not --

20 THE COURT: Okay.

21 MR. SHAW: Strength of their mark. He didn't test  
22 our product.

23 MR. HOSP: The strength -- they have argued both  
24 forward and reverse confusion. They're both at issue.

25 THE COURT: You're going to squeeze every drop of

1 blood out of this case, aren't you? Unbelievable. I'll let  
2 him testify. If I don't like it, I'll take him down.

3 MR. SHAW: Thank you, your Honor.

4 (Conclusion of Bench Conference)

5 (Open Court)

6 **KENT VAN LIERE**

7 having been duly sworn, testified as follows:

8 THE WITNESS: I do.

9 **DIRECT EXAMINATION**

10 BY MR. HOSP:

11 Q. Good afternoon. Would you introduce yourself to  
12 the jury, please.

13 A. Yes. My name's Kent Van Liere. I am retired, but  
14 I was a managing director at NERA Economic Consulting.

15 Q. And what did you do at NERA?

16 A. I did work as a survey and consumer research  
17 expert.

18 Q. Were you asked to perform survey work in this case?

19 A. Yes, I was.

20 Q. Can you explain just very briefly to the jury what  
21 it was you were asked to do?

22 A. Basically I was asked to design research to measure  
23 how important the brand Backyard Grill was in consumers'  
24 decisions to purchase grill and grill products from Walmart.

25 Q. Is one of the purposes of this to establish whether

1 or not the mark is strong or weak in terms of whether or not  
2 people purchase the mark?

3 A. Yes. Certainly a survey like this is partially  
4 evidence of whether the mark is strong or weak and whether  
5 it's influencing consumers' decisions.

6 Q. And very briefly, if you could just describe your  
7 qualifications in terms of education and experience to the  
8 jury that allows you to give testimony as an expert witness.

9 A. Sure. I went to college and then I went to  
10 graduate school. I have a Master's and a Ph.D. in sociology  
11 from Washington State University. I was trained in survey  
12 methods and statistics.

13 I started my career as a professor at the  
14 University of Tennessee. I taught statistics and survey  
15 research for seven or eight years there. And then for the  
16 next 20 years I was with a managing market research firm that  
17 did consumer research for large corporations and government  
18 agencies. And for about the last 12 years before I retired I  
19 was a director at NERA, where I did mostly survey research  
20 related to litigation.

21 MR. HOSP: Your Honor, we offer this witness as an  
22 expert in survey design.

23 THE COURT: He can express his opinions.

24 Q. (By Mr. Hosp) Now, can you describe for the jury  
25 exactly how you went about trying to determine whether or not

1 the brand in this case drives purchasing.

2 A. Yes. So basically as a very high level I did two  
3 surveys, a national survey of about 600 consumers and a  
4 regional -- southeast regional survey of about 300 of  
5 consumers who were in the market to purchase grills or grills  
6 accessories in the next year and would consider buying them  
7 at Walmart. And what we did is we showed them images of some  
8 of the products that are at issue here and then we asked them  
9 questions about what would be important in their decisions to  
10 purchase those kind of products. So that was basically what  
11 we did.

12 Q. If you would, take a look at Exhibit D-169 in your  
13 book, please. Can you identify for the jury what's contained  
14 in this exhibit.

15 A. Yes. So this exhibit is just the set of images  
16 that we used in both the national survey and the regional  
17 survey.

18 Q. And if you could put on the screen a side screen of  
19 two of the images here. Just generally speaking, what is it  
20 that the images show?

21 A. So basically we were testing three different  
22 versions of grills and one grill accessory. This is one of  
23 the grills that we tested. So on the left is the actual what  
24 we call test stimuli. It's the barbecue Backyard Grill.  
25 This one happens to be the charcoal grill, but there was also

1 a gas grill and a combined gas and charcoal grill. This is  
2 an image from Walmart's website. It shows the product and it  
3 shows the features. So this is the actual page you would see  
4 if you went to Walmart's website at the time we did the work  
5 and looked up these grills. So that was the test image that  
6 we used.

7 And then as we'll talk about, we also wanted to  
8 have a control for this survey so that we could measure the  
9 effects of guessing and other things. So the control version  
10 is on the right. It's identical to the test version except  
11 that you'll notice in the upper left-hand corner, we've  
12 changed the brand name from Backyard Grill to Barbecue Grill.  
13 So we created a fictitious, made-up, neutrally-worded brand  
14 name to serve as our control but otherwise the two images are  
15 essentially the same.

16 Q. And can you just explain to the jury what you mean  
17 by control; what is the purpose of a control?

18 A. Sure. So who knows, you may have already heard  
19 about controls, but just to briefly say, so when we do a  
20 survey and ask you questions about your perceptions, some of  
21 the way in which you answer might be influenced by guessing  
22 or you're looking at cues in the survey and trying to figure  
23 out what we're trying to do or something like that as opposed  
24 to your exact opinion.

25 So when we're testing a specific element like here



1 a brand name, what we want to do is we want to have a control  
2 that's identical to the test where we change the one thing  
3 that we're interested in and we use that to measure the  
4 degree to which the answers we got in the test were due to  
5 guessing or other sorts of what we call background noise.

6 So the only difference is we're testing Backyard  
7 Grill brand and half the people saw that and then half the  
8 people saw the control condition which said Barbecue, and  
9 we're comparing the results that we get from those two.

10 THE COURT: So if the results are exactly the same  
11 for both products, then there's no confusion whatsoever.

12 THE WITNESS: Well, this isn't essentially --

13 THE COURT: Yes or no.

14 THE WITNESS: -- a test of confusion, so I just  
15 want to correct that, but what you said is essentially right.  
16 If there is no difference between the test and control --

17 THE COURT: If you look at Backyard Grill and  
18 Barbecue Grill and you have no differentiation between the  
19 two, then neither label matters.

20 THE WITNESS: Essentially that's correct.

21 THE COURT: Is that what you found?

22 THE WITNESS: Yes.

23 THE COURT: Okay. Any other questions?

24 THE WITNESS: He shortened my testimony up.

25 MR. HOSP: Your Honor, I will literally take two

1 more minutes.

2 THE COURT: Okay.

3 Q. (By Mr. Hosp) If you go to Exhibit D-270.

4 A. 270.

5 Q. And just to identify for the jury, can you describe  
6 -- in terms of the numbers, on table 2, can you describe what  
7 it is that you see in that band that says the impact of the  
8 brand Backyard Grill for the test for the Barbecue Grill for  
9 the control.

10 A. Yes. So basically this is a summary of what  
11 consumers told us made them more likely to want to purchase  
12 this product and that's just showing what percent for each of  
13 the types of features we asked about said it made them more  
14 likely -- and you can see the yellowed thing. So the left  
15 two columns are the test and the right two columns are the  
16 control.

17 And it's showing that in the test where we had the  
18 brand Backyard Grill about 34 percent of the respondents said  
19 that was a feature that made them more likely to want to  
20 purchase the product. But they could be just responding to  
21 the fact that it's a brand. They're telling us brand is  
22 important or they're just responding to the way the survey is  
23 done. So that's why we have the control and the control is a  
24 made-up, fictitious brand name.

25 And what you see if you look on the control is

1 38 percent said it's a feature that makes them more likely to  
2 want to purchase the product. So that just means the bulk of  
3 those answers are just responding to the fact that brand's  
4 important, not specifically to the brand name Backyard Grill.  
5 Because those two numbers are essentially the same, as your  
6 Honor pointed out.

7 Q. And you conducted this for four separate products?

8 A. Yes. So we tested three grills and we tested one  
9 grill accessory, a brush, and so the tables in -- that are in  
10 your books or whatever are the tables for each of the  
11 products.

12 Q. And are the results essentially the same throughout  
13 all those four products?

14 A. Yes. They're essentially the same for all the  
15 products.

16 Q. You also did -- this survey was national, correct?

17 A. Yes. So this is the data for the national survey,  
18 correct.

19 Q. Did you also do it in a more localized region where  
20 Variety has its stores?

21 A. Yes. So we did both -- we had -- in the national  
22 survey we had some respondents who would be in this region,  
23 but we did a supplemental additional 300 respondents just in  
24 the southeast region. And so we have two ways to look at  
25 them, both the national data and the regional data.

1 Q. And did you come to the same conclusions based on  
2 the regional data as well?

3 A. Yes. If you look at the results for the regional  
4 study, they look almost identical to the study that we showed  
5 here. A little bit of differences here and there, but they  
6 lead you to the same conclusion.

7 MR. HOSP: And, your Honor, I would just move into  
8 evidence D-271, which are the tables that summarize the data  
9 from that regional survey.

10 THE COURT: They'll be received.

11 **(Defendant's Exhibit No. D-271 received into evidence)**

12 MR. HOSP: And we also move in D-169, DDX-14 and  
13 D-270.

14 THE COURT: They'll be received.

15 **(Defendant's Exhibit Nos. D-169, DDX-14 and D-270 received**  
16 **into evidence)**

17 MR. HOSP: Nothing further, your Honor.

18 THE COURT: Any cross?

19 MR. SHAW: Briefly.

20 **CROSS-EXAMINATION**

21 BY MR. SHAW:

22 Q. Mr. Van Liere, I think you testified -- the Judge  
23 asked you a question -- you didn't conduct a confusion  
24 survey, right?

25 A. This particular study would not be what's

1 traditionally called a likelihood of confusion study. This  
2 is a study that's measuring the importance of the brand in  
3 driving consumers' purchase decisions, so it's a little  
4 different.

5 Q. Relative to other product features and --

6 A. In this instance, relative to other features.

7 Q. And the context in which that question came up is  
8 when you were testifying regarding controls and you had  
9 explained what that meant to the jury. Do you recall that  
10 testimony?

11 A. I think so.

12 Q. And controls are typically used in confusion  
13 surveys, correct?

14 A. Well, they're used in confusion surveys but also  
15 most survey tests, like false advertising cases and so on,  
16 they're used regularly in these kind of studies.

17 Q. That's the control for, like you said, guessing and  
18 other noise and things like that, right?

19 A. Yes, background noise and demand characteristics  
20 and so on.

21 Q. And just to be clear, sort of the scope of what you  
22 surveyed, what it did and didn't do, you didn't conduct any  
23 survey with respect to Backyard Grill versus any other  
24 real-world brand, right?

25 A. No, exactly. We tested Backyard Grill against a

1 fictitious brand because, as I mentioned, we did that because  
2 we're measuring the degree to which people are just guessing.  
3 If they're saying brand is important and it's a made-up brand  
4 name, it's just a way of figuring out how many people are  
5 guessing.

6 Q. So I appreciate your explanation, Mr. Van Liere,  
7 and your counsel is going to have time to redirect. But we  
8 want to speed this along, so if you could just answer the  
9 questions.

10 A. Sure.

11 Q. Were you aware of the Mainstay brand that Walmart  
12 had as a private label?

13 A. Yes, I'm generally aware that they have --

14 Q. You didn't test the Mainstay brand in a survey as  
15 compared to Backyard to see which one would fare better, did  
16 you?

17 A. No, I didn't test Mainstay. I didn't understand  
18 that was at issue.

19 Q. Thank you. You didn't -- you've selected a fake,  
20 made-up name called Barbecue Grill, which is made up of two  
21 descriptive terms, at least according to Ms. Dineen,  
22 Walmart's senior buyer, right?

23 A. We created a brand name that was similar to  
24 Backyard, but it was neutrally worded and it wasn't a real  
25 brand that any company was using in the marketplace so far as

1 we knew, that's correct.

2 Q. Do you think a company could use a name Barbecue  
3 Grill as a brand name?

4 A. Sure.

5 Q. Hmm. The method that you described -- the type of  
6 survey you used, you call that a constant sum methodology,  
7 right?

8 A. The results that we discussed primarily are just  
9 the proportion of consumers who said the features made them  
10 more likely to want to purchase the products. There was an  
11 additional exercise they did to help us understand the  
12 importance and that was the constant sum allocation. We  
13 didn't look at those tables.

14 Q. The constant sum allocation, that's what I was  
15 referring to, the method you used.

16 A. Right. I'm just saying we didn't talk about that  
17 yet.

18 Q. That's different than the example conducting a  
19 brand valuation study, right?

20 A. Yes. The way we conducted this study is not what  
21 we would call a brand valuation study. It's a measure of how  
22 important is the brand in consumers' decisions to purchase  
23 products.

24 Q. I appreciate that, we've heard that before. So  
25 again, just try to answer the question I asked you.

1           You didn't conduct a survey to determine the value  
2 of the brand as it applies to, like, a willing buyer that  
3 might want to come in and buy the Backyard Grill. That  
4 wasn't something you did, right?

5           A.     That's correct.

6           Q.     Or a willing licensor or licensee, someone who  
7 wanted to have -- paid to license the brand. You didn't  
8 conduct that type of survey either?

9           A.     No. I wasn't asked to do that.

10          Q.     And you're not offering an opinion as to the value  
11 of the Backyard brand to Walmart, right?

12          A.     No, I'm not.

13          Q.     You didn't spend any time analyzing why Walmart  
14 selected the Backyard brand, did you?

15          A.     No, not particularly.

16          Q.     And the constant sum method that we just talked  
17 about that you did, that's primarily designed, as I  
18 understand it, to measure relative importance of product  
19 features and attributes as to one another. Is that generally  
20 speaking correct?

21          A.     It was designed to measure the relative importance  
22 of brand name and other features that consumers might  
23 consider in purchasing those brands, yes.

24          Q.     But the method is not what you did here, but the  
25 method is generally used for -- is my understanding and your



1 testimony before -- is to measure relative strength of  
2 features, attributes and factors involved in a product; is  
3 that accurate?

4 A. Yes, with regard to their importance in consumers'  
5 decisions to purchase the product.

6 Q. Okay. Let's just talk then for a minute about  
7 brand as opposed to these product attributes. You agree that  
8 a brand serves as sort of the identifier of the product,  
9 right?

10 A. Yes. Brands serve as source identifying  
11 information, sure.

12 Q. It helps people find the product that they want,  
13 right?

14 A. It's -- yes, it's a source identifying  
15 characteristic of a product.

16 Q. So in other words, they can allow the consumer to  
17 distinguish between one versus another?

18 A. Potentially, sure.

19 Q. That's sort of the essence of a brand, right?

20 A. Well, it's one function of a brand.

21 Q. And the brand itself is not -- the value or  
22 importance of a brand isn't something that's simply dependent  
23 upon the moment a consumer decides to buy a product, is it?

24 A. Brands have importance in context other than just  
25 when you're about to make a decision to purchase a product,

1     sure.

2           Q.     And those other values of a brand, those are things  
3     that were not measured in your survey, right?

4           A.     My survey is focused on the importance of the brand  
5     in consumers' decisions to purchase the products, that's  
6     correct.

7           Q.     So not the other basis for valuation of a brand,  
8     correct?

9           A.     Well, I guess I'm not agreeing completely because  
10    those things may come into play as part of how a consumer  
11    forms their understanding of what's important to them in  
12    making a purchase decision. So they're not unrelated, but  
13    I'm specifically measuring whether the brand was important or  
14    driving consumers' decisions to purchase these products.

15          Q.     Would you agree with the statement that the value  
16    of a brand to a company or in a transaction isn't simply  
17    dependent on the value of the brand to an individual or the  
18    importance of the brand to an individual at the moment they  
19    make a decision to buy a product? Would you agree with that  
20    statement?

21          A.     Yes.

22          Q.     And isn't it true that this is the first time in  
23    litigation, in a trial where you've reached a conclusion  
24    about the relative importance of a brand in consumer  
25    purchasing decisions?

1           A.     I'd have to think about that. I've done a lot of  
2 cases. I don't know specifically if it is or it isn't.

3           Q.     You had your deposition taken by me for the  
4 purposes of this case, correct?

5           A.     Yeah. A couple years ago.

6           Q.     In 2016. And I asked you the question then: As  
7 you sit here today, this is the only survey where you've  
8 reached a conclusion that you can recall regarding the  
9 relative importance of the brand in consumer purchasing  
10 decisions.

11                   In this litigation, is that your question?

12                   Yes.

13                   And your answer: Yes, that's correct.

14                   Was that testimony truthful at that time?

15           A.     Yes. I believe at that time I hadn't done any  
16 studies that specifically focused on only brand, the  
17 importance of brand.

18           MR. SHAW: I have no further questions, your Honor.

19           THE COURT: Do you have anything further?

20           MR. HOSP: Nothing, your Honor.

21           THE COURT: Thank you. You're excused.

22                   (Witness Excused)

23           THE COURT: Any other witnesses?

24           MR. LONG: We rest, your Honor.

25           THE COURT: Do you have rebuttal evidence?

1 MR. ADAMS: We do, your Honor.

2 MR. SHAW: Just a moment, your Honor.

3 MR. HOSP: Your Honor, we renew our motions for  
4 judgment on the pleadings -- judgment as a matter of law.

5 THE COURT: All right. I'll take it under  
6 advisement.

7 MR. HOSP: Thank you.

8 THE COURT: Call your first witness.

9 MR. SHAW: Your Honor, we call Ken Hollander to the  
10 stand.

11 **KENNETH HOLLANDER**

12 having been duly sworn, testified as follows:

13 THE WITNESS: I do.

14 **DIRECT EXAMINATION**

15 BY MR. SHAW:

16 Q. Good afternoon, Mr. Hollander. Could you please  
17 introduce yourself to the jury.

18 A. My name is Ken Hollander.

19 Q. And Mr. Hollander, where do you work?

20 A. I work in my own firm in California. Kenneth  
21 Hollander Associates.

22 Q. And what is Kenneth Hollander and Associates?

23 A. Survey research firm.

24 Q. Can you explain a little more about what that  
25 entails?

1           A.     Sure. I too have more than -- I'm sorry, the tail  
2 end of a cold, I apologize to everyone. I too have over 40  
3 years' experience. I've been doing this kind of research,  
4 intellectual property survey research, since 1986. And  
5 before that I was employed by Proctor & Gamble in Cincinnati  
6 and trained by them.

7                     I then became associate research director for  
8 Hallmark Cards in Kansas City and then vice-president  
9 director of the Communications Planning Group in Atlanta,  
10 which was part of the inter-public group of companies which  
11 was the largest communications holding company in the world.  
12 My job was solely to consult with the Coca-Cola Company and I  
13 did that for 20 years -- my life was brand Coca-Cola -- and  
14 then I segued into this intellectual property survey research  
15 that we're going to be talking about today.

16           Q.     And can you name some of the companies you've done  
17 survey research work for?

18           A.     Sure. Anheuser Busch, Bank of America. Of course  
19 the Coca-Cola Company. Delta Air Lines, Eastman Kodak, Ford  
20 Motor Company, General Mills, General Motors, General Foods,  
21 Hallmark Cards, IBM, et cetera.

22           Q.     And do you also have relevant educational  
23 experience related to this --

24           A.     I got my Bachelor of Science degree from Ohio State  
25 University and a Master's degree in marketing from the

1 University of Missouri.

2 Q. And if you could just approximate for the jury how  
3 many consumer surveys have you been involved with either  
4 where you've conducted or you've critiqued them or anything  
5 of that nature?

6 A. In terms of intellectual property, over 200. In  
7 terms of my entire career, over 2,000.

8 Q. And what about testifying like you are here today  
9 in court; how many times have you done that?

10 A. Roughly 40 times.

11 Q. Okay. And were you retained as an expert in this  
12 case?

13 A. I'm sorry?

14 Q. Were you retained as an expert in this case?

15 A. Yes, I was.

16 Q. And what do you understand you were retained to do?

17 A. To review and discuss the survey conducted by Mr.  
18 Poret.

19 MR. SHAW: Your Honor, at this time we would like  
20 to offer Mr. Hollander as an expert in the field of trademark  
21 survey and research to express his opinions.

22 THE COURT: He can express an opinion.

23 Q. (By Mr. Shaw) Mr. Hollander, you were in court  
24 when Mr. Hal Poret testified, correct?

25 A. I'm sorry?

1 Q. You were in court when Mr. Poret testified?

2 A. I was in court, yes, I was.

3 Q. And you heard him testify regarding his survey?

4 A. I did.

5 Q. And did you have an opportunity to evaluate his  
6 opinions that he offered?

7 A. I did.

8 Q. And could you just tell the jury, what were your  
9 initial thoughts when you heard him testify?

10 A. I know you folks have heard an awful lot and it's  
11 confusing, but the common sense of survey research is you ask  
12 the right questions of the right people in the right way and  
13 you analyze them fairly.

14 My conclusion about Mr. Poret's survey was that he  
15 did not ask the right questions of the right people in the  
16 right way. And that's because in the real world, if I'm in  
17 the market for a grill and I go to Walmart, I can only get  
18 one Backyard product. If I go to Roses and I see a Backyard  
19 product, I can only get one product. But Mr. -- but it's  
20 like walking up to a Coca-Cola vending machine. You expect  
21 to get a Coca-Cola product out of that vending machine. I go  
22 to Walmart and buy a grill, I expect that it's emanating  
23 from -- that it's part of, provided to me by Walmart.

24 So when Mr. Poret conducted his survey in the  
25 Walmart store, it's no surprise to me that he found no

1 confusion. I had suggested previously that a fairer way  
2 would have been to try to truly replicate the marketplace  
3 which I, as an individual, can go to a Walmart and buy a  
4 Backyard, I can go to another store and look at a whole array  
5 of brands. I can go to a Roses and buy a Backyard. There's  
6 an awful lot of ways that I can do that.

7           So to replicate the marketplace, I suggested in my  
8 critique is a technique that survey researchers like me use  
9 all the time and Mr. Poret uses them also, and it's called a  
10 lineup. And that's where, in fact, you show the senior  
11 brand, the first guy into the marketplace, and you take it  
12 away and then you show the junior brand, the second guy in  
13 the marketplace, and a couple of controls. And you ask a  
14 series of non-leading questions to the extent that do you  
15 think that any of these second products are put out by the  
16 same people that put out the same product you saw or do you  
17 think that they are associated, affiliated or connected with  
18 them. And that more fairly replicates the marketplace, which  
19 is what we're all supposed to do when we conduct surveys.

20           So my critique was start with -- it's the wrong  
21 questions to the wrong people in the wrong setting. Part of  
22 the wrong questions is that Mr. Poret asked the question that  
23 assumed a well-known brand. He asked what we call a  
24 protocol, a set of questions that had been accepted by the  
25 Court called Ever-Ready questions. And that started back, I



1 think, in 1974 at Ever-Ready v. Union Carbide where you had  
2 Eveready batteries and then all of a sudden this new guy  
3 comes in with Eveready bulbs and there was a likelihood of  
4 confusion. Eveready was a big-time, famous, national brand.  
5 So you don't show anything other than the junior product,  
6 which in this case was the Eveready bulbs, and you say, what  
7 else comes to mind? And most people are going to say  
8 batteries, of course, because it's a famous, big-time brand.

9 In this case, this is -- this was not a national --  
10 it's important to both of the litigants, of course, and it's  
11 well-known to both of the litigants, but it's not a national,  
12 big-time brand like Eveready or Coca-Cola or Apple. So it is  
13 fairer to both participants and certainly fairer to the Court  
14 in determining the relevance and the weight of the survey if  
15 you did this, finger quotes, lineup survey where both brands  
16 are seen the same way that they have the opportunity to be  
17 seen in the marketplace. I can't be confused as a consumer  
18 unless I encounter both brands.

19 So Mr. Poret's survey not only was conducted sort  
20 of kind of inside of a Coca-Cola vending machine, but he  
21 asked a question that didn't introduce both brands.

22 Finally -- I shouldn't say finally, but  
23 importantly -- and you've all heard people like me talk about  
24 the importance of a control -- Mr. Poret didn't use a  
25 control. In his report he said, I was going to use a control

1 and then I saw that the results were zero in my test cell so  
2 I didn't use one.

3 So my first thought was, well, that's kind of  
4 interesting, because the only way you would know that the  
5 results were zero is when you finished the test and how did  
6 you know the results were going to be zero before you did the  
7 test and didn't use a control.

8 The way to use a control is every other person  
9 that's qualified to take the survey, the first person goes  
10 into the test group, the second person is in the control  
11 group, the third person in the group, and so on. Then when  
12 you're finished, you analyze the data and see what you have.

13 I think Mr. Poret may have thought that because of  
14 the way he was conducting his testing, he may not have needed  
15 a control because the results were going to be close to zero.

16 Finally, we're supposed to ask the right questions  
17 of the right people. And the right people I understand in  
18 this case are principally male 35-to-50-year-olds who  
19 comprise the purchasing public for these products. And only  
20 72 of Mr. Poret's 209 respondents were males 35 to 50.

21 Q. Well, thank you.

22 A few just followup questions to clarify. You  
23 mentioned the word "lineup survey," right?

24 A. Yes.

25 Q. And there are variations of sort of that lineup

1 format, are there not?

2 A. There are.

3 Q. Okay. And you heard Mr. Poret and you testified  
4 that he has used lineup surveys in the past, right?

5 A. I heard that.

6 Q. Okay. And the purpose I think is that so you can  
7 expose the participants to the mark before you're asking  
8 whether they're confused with some unknown mark? Is that  
9 sort of the idea?

10 A. The purpose of -- and it's called the lineup  
11 because it's named after a police lineup. Somebody says,  
12 that guy did it, so you show that guy with a bunch of other  
13 people that sort of look like him and then the witness has to  
14 pick that guy out of the lineup.

15 In this case, that guy is the junior brand, the  
16 second guy into the marketplace, and so we show the junior  
17 brand and the senior brand and a bunch of controls in a  
18 lineup so that the respondent can say, yes, if there is a  
19 connection and if there's the possibility of confusion, it's  
20 because the second guy looks like the first guy. But you see  
21 both brands. That is the sense of your question, that is the  
22 sense of my answer.

23 Q. And you're generally familiar with Mr. Poret's  
24 limited testimony in another case where he did that exact  
25 protocol when he was testifying for the plaintiff. Did you

1 hear him testify about the Muscle Milk?

2 A. In the Milk case.

3 Q. And is that sort of the format you would have done  
4 if you had conducted a survey in this case? Sort of like  
5 that Muscle Milk?

6 A. If I had been --

7 Q. If you had been asked about by Variety to conduct a  
8 survey, how would you have conducted that survey?

9 A. I would have conducted a lineup because it more  
10 fairly replicates the marketplace, I believe.

11 Q. And explain to the jury then again specifically,  
12 this concept of double-blindness and why it was wrong, in  
13 your view, to conduct this survey inside of a Walmart store?

14 A. Probative survey, those that the courts give weight  
15 to, should be, among other things -- more finger quotes --  
16 double-blinded. That means that neither the participants  
17 should know the sponsor or the purpose of the survey, nor  
18 should the people conducting the survey know the purpose or  
19 the sponsor of the survey.

20 In this case, it's pretty hard not to make some  
21 informed guesses on everybody's part. If I'm inside a --  
22 four Walmart stores, with the permission of Walmart stores,  
23 to be asking questions of Walmart customers on Walmart  
24 territory, on Walmart selling time, that Walmart probably has  
25 something to do with this survey. So it wasn't

1 double-blinded.

2 Q. So it wasn't double-blinded. And on top of that,  
3 you had heard Mr. Poret say he thought it was okay to ask the  
4 question about which company or store rather than ask about  
5 which brand. Is that a problem as well?

6 A. It strikes me as potentially leading because we're  
7 inside of a Walmart store. And the subject of the litigation  
8 and the survey is a look-alike, sound-alike brand name, not a  
9 look-alike, sound-alike store name.

10 Q. When you say leading, do you mean that the survey  
11 could be potentially biased in Walmart's favor?

12 A. Well, that's what leading means. It is not  
13 unbiased, it is not neutral.

14 Q. You mentioned something about that he should  
15 have -- you heard my question and you heard his answer about  
16 the universe of the population and the sample size that he  
17 drew from that universe. He seemed to think that it was okay  
18 that he was left with 72 males age 35. Do you think that's  
19 enough to conduct a valid survey in this case?

20 A. As Mr. Poret answered your question, he was correct  
21 in saying zero out of 72 is the same as zero out of 209. My  
22 problem with that is the way he got to zero, and I believe it  
23 is because of what he did and the way he did it and the  
24 questions he asked. So that if he had asked 5,000 people, he  
25 may still have gotten zero because it was inside of a Walmart

1 store, et cetera.

2 Q. You understand and you talked about controls and  
3 the importance of controls. Have you reviewed any research  
4 or in your experience heard professors or anyone say that the  
5 lack of a control is recognized as sort of a fatal weakness  
6 to a survey?

7 A. I know that Professor Shari Diamond, who was a  
8 renowned expert, Northwestern University, says that under  
9 normal circumstances, the absence of a control can be a fatal  
10 error.

11 Q. And you heard -- I believe you heard Dr. Van Liere  
12 testify in his relative -- whatever his survey was that he --  
13 he used a control in his survey and said they're typically  
14 used in trademark confusion surveys, yet we heard two  
15 confusion surveys offered by Walmart and neither one of them  
16 used a control. Do you have any idea why that would have  
17 been?

18 A. No. It would be pure conjecture, but I will tell  
19 you that it's most unusual not to use a control. And in my  
20 experience, the courts do not usually look kindly on  
21 experiments conducted without a control.

22 Q. So in your opinion, Mr. Hollander, can the jury  
23 fairly and accurately rely on Mr. Poret's surveys and  
24 conclusions in this case?

25 A. Based on what Mr. Poret did and the way he did it,

1 I believe that they cannot.

2 Q. Thank you.

3 MR. SHAW: No further questions.

4 MR. HOSP: I have three or four questions.

5 THE COURT: All right.

6 **CROSS-EXAMINATION**

7 BY MR. HOSP:

8 Q. Mr. Hollander, you criticized Mr. Poret's survey  
9 because it was an Eveready survey rather than what you call a  
10 lineup survey, right?

11 A. Because it was a -- yes. Because it was an  
12 Eveready rather than a lineup.

13 Q. You've done Eveready surveys in your career, right?

14 A. I have.

15 Q. Now generally speaking, you agree the goal of the  
16 survey is to replicate the real-world marketplace conditions  
17 as much as possible, correct?

18 A. Correct.

19 Q. You criticize Mr. Poret's survey because it was  
20 conducted in Walmart stores, correct?

21 A. Yes.

22 Q. Now, you're aware that the Backyard Grill products  
23 are only available in Walmart stores; isn't that right?

24 A. Yes, sir, but -- may I finish?

25 Q. Certainly.

1           A.     But I, as a consumer, have lots of choices and I  
2     can be confused if I am aware that there is a Backyard in a  
3     Walmart store and there's a Backyard in a Roses store and  
4     I -- but that potential confusion, which is the whole purpose  
5     of the survey, can't be replicated in Mr. Poret's survey  
6     setting inside of a Walmart store. And that was the sense of  
7     my criticism.

8           Q.     But you do agree that the Backyard Grill products  
9     are only available in the Walmart stores, correct?

10          A.     Yes.

11          Q.     You were asked how you would do a survey if you  
12     were asked to do a survey by Variety. Do you recall that?

13          A.     Yes.

14          Q.     You weren't asked to do a survey by Variety, were  
15     you?

16          A.     No, sir, I was not.

17          Q.     They never came to you and said, we want to find  
18     out whether or not there is a likelihood of confusion, did  
19     they?

20          A.     I was not asked.

21                 MR. HOSP:   Nothing further, your Honor.

22                 THE COURT:   Is that all?

23                 MR. SHAW:   Nothing else.

24                 THE COURT:   All right.

25                 MR. SHAW:   Thank you.



1 (Witness Excused)

2 THE COURT: Do you have any other witnesses?

3 MR. ADAMS: We do, your Honor. We'll call Mr.  
4 Robert L. Klein.

5 **ROBERT L. KLEIN**

6 having been duly sworn, testified as follows:

7 THE WITNESS: I do.

8 **DIRECT EXAMINATION**

9 BY MR. ADAMS:

10 Q. Good afternoon, Mr. Klein.

11 A. Good afternoon.

12 Q. Would you give the Court and jury a brief summary  
13 of your credentials and experience.

14 A. Sure. My name's Robert Klein. I am the chairman  
15 and cofounder of Applied Marketing Science. We are a  
16 research marketing consulting firm based in Boston. I kind  
17 of grew up in Atlanta but went north to go to school and  
18 stayed there. I have an undergraduate degree, Bachelor of  
19 Science, in mechanical engineering from MIT and a Master of  
20 Science degree from MIT Sloan School of Management.

21 Q. All right. And give the jury -- Court and the jury  
22 a summary of your expertise and your experience in survey  
23 work.

24 A. Okay. So I've been doing surveys for 48 years now,  
25 mostly for companies that aren't involved in litigation. Our

1 company has about 35 employees in the Boston area, and I like  
2 to say our clients range from A to Z, from American Airlines  
3 to Baxter to Coca-Cola to John Deere to an X, a Y and a Z.

4 Most of -- I've done over a thousand surveys in my  
5 career. As I say, most have been not for litigation, but for  
6 helping companies decide whether to launch a new product or  
7 not or how much to spend for advertising and questions like  
8 that.

9 Q. And Mr. Klein, who are some of the clients that  
10 you've represented during your career?

11 A. So as I was saying, American Airlines, Baxter,  
12 Coca-Cola, John Deere, Ethicon, Fidelity, General Mills,  
13 General Motors and Microsoft. Variety gave me the "V" in my  
14 list of clients.

15 Q. All right. And have you had surveys conducted by  
16 yourself accepted in courts throughout the United States?

17 A. Yes, I have.

18 MR. ADAMS: Your Honor, at this point the plaintiff  
19 would tender Mr. Klein as an expert in survey methodology.

20 THE COURT: He can offer his opinions.

21 Q. (By Mr. Adams) Now, Mr. Klein, what did Variety  
22 ask you to do in this case?

23 A. So I was asked to take a look at the expert reports  
24 that were produced by Mr. Mantis and Dr. Van Liere and to  
25 evaluate them and see whether they could serve as a basis for

1 the opinions they expressed in those reports.

2 Q. All right. First of all, let's start from the back  
3 and work forward. You conducted a review of the Mantis  
4 survey; is that correct?

5 A. That's correct.

6 Q. And at the end of your review of the survey, did  
7 you conclude that this survey was reliable and could be  
8 relied on by the jury or otherwise?

9 A. My conclusion was that it was not reliable; that  
10 there were very serious flaws with what Mr. Mantis did that  
11 rendered it incapable of serving as a basis for the opinion  
12 that he offered.

13 Q. All right. Let's go back to the top then. What is  
14 it that Mr. Mantis tried to do in this case?

15 A. So Mr. Mantis, as I heard and you heard, was trying  
16 to measure the extent to which Roses' customers or Variety's  
17 customers -- I'm not sure how it's been referred to.

18 Q. Both.

19 A. Okay. Would be confused and think that the  
20 products labeled Backyard Barbecue that are sold at Roses are  
21 the same ones that are sold at Walmart or come from the same  
22 source. And so what he did was he recruited people to come  
23 into a facility and he sat them down -- and you saw the  
24 picture of them across the table from these four Roses'  
25 products -- and he asked them a series of questions about

1 where those products came from.

2 Q. All right. And based on the types of questions  
3 that Mr. Mantis asked, what kind of results did he obtain?

4 A. Well, Mr. Mantis found that very few people  
5 actually mentioned Walmart. Nine out of -- and he  
6 interviewed 121 people, I believe he said, but actually only  
7 79 of them had any -- could come up with the name of any  
8 store at all.

9 And so of the 79, nine out of the 79 mentioned  
10 Walmart in one form or another. But a survey like that  
11 really can only be valid if the people know that Walmart  
12 actually produces something called Backyard. If you've never  
13 seen the Backyard product at a Walmart store, you're not  
14 going to be able to come up with the Walmart name. That's  
15 why a survey of this type can only be valid for products that  
16 are really widely known, top of mind. If I show you a  
17 Coca-Cola bottle, empty, you'll recognize it as a Coca-Cola  
18 bottle because Coke is a very well-known brand. But if I  
19 show you a bottle that is made by a company that has a very  
20 low market share or very low awareness, you'll never be able  
21 to come up with their name.

22 And that's why for a survey to really be valid and  
23 accurately measure confusion about where something comes  
24 from, if awareness really isn't high in the marketplace --  
25 and I don't think there's any reason to think that a huge

1 percentage of the population is aware that Walmart sells a  
2 product called Backyard -- if everybody doesn't -- isn't  
3 aware of that, they won't be able to come up with the Walmart  
4 name, and so what you would do instead is show both products.  
5 You show one product, take it away, show the other product,  
6 take it away and ask, do those come from the same company or  
7 different companies? And that would be an appropriate way to  
8 make a measurement of likelihood of confusion in situations  
9 where brand awareness is not very high.

10 Q. We've heard one of the other witnesses talk about  
11 an Eveready survey. What you've just described Mr. Mantis  
12 did was an Eveready survey, correct?

13 A. That's the style of a single stimulus and asking  
14 open-ended questions about where does this product come from.

15 Q. Right. And according to Mr. Mantis, this survey  
16 would be most appropriate in a situation where the product  
17 being tested was something that had large recognition like,  
18 for example, Eveready batteries; is that right?

19 A. That's correct.

20 Q. That's not what Mr. Mantis should have done in this  
21 case, is it?

22 A. No, I don't believe it is.

23 Q. All right. Mr. Mantis testified that because the  
24 products aren't sold side by side, it would be inappropriate  
25 to show both Walmart and Roses products and ask if they came

1 from the same company or different companies. Do you agree  
2 with that?

3 A. No, I don't. And it's not that they shouldn't --  
4 that they have to be sold side by side, but it's more that  
5 when you see one product, you can retrieve from memory the  
6 presence of another product. So if you were, for example,  
7 shopping for a barbecue grill and you go into Walmart and you  
8 do some comparison shopping. So you go into Walmart and a  
9 week later you go into Roses, you're not going to have  
10 forgotten what you saw at Walmart. I mean, that was the  
11 whole reason you're doing comparison shopping is to be able  
12 to compare what you see in one store with what you see in  
13 another.

14 So being sold side by side isn't really the test.  
15 The test is really whether they're close enough in space or  
16 time that when you see one, you can remember that you've seen  
17 something that looked like that or was named like that  
18 previously. And so if you're only going to show one product  
19 and if the answer you're looking for or not looking for is an  
20 unknown or a low awareness brand, the deck is really stacked  
21 against the getting an answer that would indicate confusion.

22 Q. Now, Mr. Klein, in this case, as I'm sure you know,  
23 we have a situation where Variety sells its brand, which is  
24 Backyard Barbecue, and Walmart sells its brand, which is  
25 Backyard Grill, correct?

1           A.     Correct.

2           Q.     Now, in the situation you described where a  
3 customer may shop either Walmart first or Roses first and  
4 then some period of time passes, is there an aspect of  
5 relevance to the fact that both of these marks have both  
6 dominant and generic or descriptive aspects to them?

7           A.     Well, I think that the similarity of the name is  
8 what people are going to focus on if they're able to retrieve  
9 one versus the other.

10          Q.     By that you mean Backyard, correct?

11          A.     That's correct.

12          Q.     And what about the descriptive terms, BBQ or  
13 barbecue and grill?

14          A.     Well, that's certainly not the dominant part of the  
15 trademark. It's not the first word that jumps out at you.

16          Q.     That simply describes the products, correct?

17          A.     That's correct.

18          Q.     Now, was there any other flaws in the survey, for  
19 example, the way the Roses' product was priced and so forth?

20          A.     Well, what he showed were Roses -- four products  
21 from Roses. And these were all customers of Roses, and so  
22 it's not surprising that I think almost exactly half the  
23 people who had some idea of where these products came from  
24 said Roses. That was the number one answer.

25                 The Roses product he showed had prices on them --

1 on the product, which is not the way Walmart typically sells  
2 its products, and they used whole-dollar pricing where  
3 Walmart typically will use, you know, 4.99, 3.99, something  
4 of that nature. So the products he showed to Roses'  
5 customers would look like Roses' products and that's what  
6 they said. That's the answer they gave.

7 Q. And Mr. Klein, the first survey question asked was  
8 what company or store. What does that imply to the survey  
9 respondent?

10 A. Well, it implies that there's only going to be one  
11 company or store that would sell that product. And so if you  
12 ask what companies or stores would also sell that product,  
13 that would be a different -- that would lead you into a  
14 different direction and give the opportunity for someone to  
15 recognize that the product is sold in multiple stores.

16 Q. Well, that would sort of defeat the purpose of  
17 doing the survey, wouldn't it?

18 A. Well, I think you want to be careful not to ask  
19 leading questions.

20 Q. My mistake. You can answer that any way you want  
21 to or don't answer it at all.

22 A. No, in a survey setting --

23 Q. Right.

24 A. -- I think it's important not to ask leading  
25 questions, questions that suggest that there's only one



1 answer or one particular answer that they're looking for.

2 Q. And is that what Mr. Mantis did in this case?

3 A. That's my impression, yes.

4 Q. All right. Now, were there many more Walmart  
5 mentions in the survey results than referenced by Mr. Mantis  
6 in his results?

7 A. There were nine mentions of Walmart in the -- in  
8 his results and --

9 Q. As opposed to the two Mr. Mantis gave credit to,  
10 what effect does the fact that there were nine have on the  
11 results of this survey?

12 A. Well, he didn't have any kind of a control group to  
13 account for guessing. And so I think you have to look at  
14 those nine out of the 79 who expressed an opinion who had an  
15 idea, and now you've got 11 percent of the people that he  
16 interviewed mentioning Walmart as a possible place where  
17 these products would be sold.

18 Q. Now, Mr. Klein, can you explain to the jury very  
19 briefly what a confidence interval is in connection with this  
20 type of survey?

21 A. So a confidence interval is really how sure are you  
22 of the -- as I was saying, nine out of 79 or 11 percent is,  
23 and it's a function of really how many people you've  
24 interviewed. And so the wider -- the fewer people you  
25 interview, the less certain you are of the results you've

1 gotten, whereas if you interview three or four or five or 600  
2 people, you're much more likely to see -- and you've seen it  
3 in the newspapers now when they report the poll, it's a plus  
4 or minus three percent error range for an election result or  
5 something like that.

6 Q. And what was the confidence interval in this case?

7 A. I don't recall the specific number.

8 Q. Your report indicates -- I'll help you. It  
9 indicates it was 95 percent and for this result the plus or  
10 minus 4.66.

11 A. Right. Okay.

12 Q. All right. Now, the Mantis report counted only two  
13 of the confusion -- two of these instances as confusion  
14 responses and the rest were counted as either possible  
15 confusion responses or other Walmart mentions. Is there any  
16 significance to that fact when you consider that Mr. Mantis  
17 did not do any type of control?

18 A. Well, I think it means you really have to look at  
19 those and say, well, those could all be real, and that this  
20 was done by an interviewer. And so the way in which someone  
21 responds to an interviewer's question, they say, well, it  
22 could be Walmart. We don't know the tone of voice they used  
23 or anything like that, but without a control group, I think  
24 you're just kind of forced to look at that and say, okay, so  
25 11 percent of the people who expressed an opinion mentioned

1 Walmart.

2 Q. Now, finally -- well, maybe not finally. There  
3 were 121 responses --

4 THE COURT: I knew you didn't mean finally. It was  
5 self-evident.

6 MR. ADAMS: My apologies, your Honor.

7 THE COURT: Too late.

8 Q. (By Mr. Adams) The 121 responses. In your  
9 opinion, is that a fair sample size for a survey of this  
10 sort?

11 A. It's pretty small. We would typically use two or  
12 300 respondents to measure likelihood of confusion in a  
13 setting like this.

14 Q. All right. And Mr. Klein, if you take all nine of  
15 the responses and count them, you get a 7.4 percent confusion  
16 rate; is that right?

17 A. Well, that would be what you get if you counted  
18 everyone that he interviewed, but if you only look at the  
19 people that actually had an opinion, that were able to come  
20 up with the name of a store, it's nine out of 79, which is  
21 about 11 percent.

22 Q. Right. And if you apply the confidence interval,  
23 would the true range be -- could be even higher?

24 A. Yes.

25 Q. All right. Now, here's the "finally." Was there

1 any evidence in reviewing the answers that, in fact, the  
2 respondents were prompted by the interviewer or the interview  
3 facility to identify the product as coming from Roses? And  
4 to help you with this, I'm going to put up a page from your  
5 report.

6 A. Okay.

7 Q. And, Mr. Klein, I refer you to this paragraph that  
8 begins with, "Finally." Can you read that?

9 A. I'm sorry, I can't.

10 Q. Let me read it for you.

11 A. Okay.

12 Q. "Finally, there is some evidence in their answers  
13 that respondents were prompted by the interviewer or the  
14 interview facility to identify the products as coming from  
15 Roses. For example, respondent 027 answered question 1,  
16 quote, based on the question beforehand, it might be Roses.  
17 Respondent 057 answered question 1, quote, and since I was  
18 already prompted with the Roses' question, close quotes.  
19 Respondent 58 answered question 2A as, the lady said out  
20 there, Roses, close quotes. Respondent 120 answered question  
21 2A, quote, because you asked me if I was willing to shop for  
22 grill tools or accessories at Roses, close quotes. And  
23 respondent 121 answered question 2A, I would say based on  
24 question she asked, I would say Roses, close quotes.

25 Mr. Klein, is that an appropriate way for a

1 surveyor to conduct a survey in a situation like this where  
2 you're supposed to be getting neutral, non-prejudiced  
3 results?

4 A. Well, one of the real principles of market research  
5 is that the study should be double-blind; that is, that  
6 neither the interviews nor the people participating in the  
7 survey should know what the -- who is sponsoring it or how  
8 the results are going to be used. Just the way if they do a  
9 drug trial and half the group gets the placebo and half gets  
10 the real drug. You can't let the doctor know which is the  
11 real drug and which is the placebo, you have to make them  
12 look the same. And so anything that an interviewer does to  
13 focus attention on one particular store or one particular  
14 brand is going to bias the kind of results that they get.

15 And so in this case, it certainly sounds like there  
16 was directed questioning about Roses in recruiting the  
17 respondents and the respondents then figured out that that's  
18 who the survey was about and would lead them then to answer  
19 Roses as opposed to anything else like Walmart.

20 Q. Thank you, Mr. Klein.

21 MR. ADAMS: Your Honor, I have no further questions  
22 of this witness regarding the Mantis survey, but the witness  
23 will also give testimony regarding the Van Liere survey.

24 THE COURT: When?

25 MR. ADAMS: We can do it now or we can do it

1 tomorrow morning. I would expect it would take about 15 to  
2 20 minutes.

3 THE COURT: And then you have other witnesses after  
4 this?

5 MR. ADAMS: Yes. We have a rebuttal witness, Mr.  
6 Blackburn.

7 THE COURT: So you're not going to finish today?

8 MR. ADAMS: No.

9 THE COURT: Okay.

10 Do you have any questions for this witness?

11 MR. HOSP: When his -- I will be very brief, but  
12 when his examination is over I will probably have about --

13 THE COURT: You're not finished with him? Well,  
14 keep going then.

15 MR. ADAMS: I'm sorry?

16 THE COURT: You haven't finished with this witness.

17 MR. ADAMS: I have for the first expert, but I  
18 can --

19 THE COURT: You're calling him as a rebuttal  
20 witness, so you haven't disclosed that he was going to be a  
21 witness, I presume, because you don't have to disclose  
22 rebuttal witnesses because you don't know if you're going to  
23 have rebuttal until you know what the case is.

24 MR. ADAMS: No, he has been identified --

25 THE COURT: As a rebuttal witness?

1 MR. ADAMS: Yes, sir.

2 THE COURT: So you planned to try the case this  
3 way?

4 MR. ADAMS: Correct.

5 THE COURT: Okay. Go ahead and finish with him.

6 MR. ADAMS: Okay.

7 Q. (By Mr. Adams) Now, Mr. Klein, you also conducted  
8 a review of the report of Kent Van Liere, correct?

9 A. That's correct.

10 Q. And again, as we did before, will you, first of  
11 all, just give us a brief summary of what your opinion was.

12 A. Well, again, Dr. Van Liere was trying to determine  
13 the value of the Backyard as a brand, but the way he went  
14 about doing that without really having a valid control leaves  
15 you with the result that essentially over half the people  
16 that he interviewed said that the Backyard brand was  
17 important -- was a factor that made them more likely to buy  
18 the product. And so rather than say the Backyard brand has  
19 no value, I think his results say the Backyard brand does  
20 have value and influences the purchase behavior of  
21 respondents.

22 Q. And was there a certain percentage that the Van  
23 Liere report revealed in that study?

24 A. Yes. If you look at -- and remember he showed  
25 multiple products to respondents and for each one asked what

1 was important and what would make them more or less likely to  
2 buy. And so for over half the respondents for at least one  
3 of the products, they said that the Backyard brand would make  
4 them more likely to purchase it.

5 Q. And actually, Mr. Van Liere submitted two  
6 surveys -- reports, correct?

7 A. That's correct.

8 Q. And so when he submitted his first survey report,  
9 we asked you to review it and what conclusions did you come  
10 to?

11 A. That there were a number of issues I felt with the  
12 first report. First of all, it was national in scope as  
13 opposed to just focusing on the area where Roses was selling.  
14 So there were people who may never have seen the Backyard  
15 brand from Roses. So in that case, that sample was what we  
16 call over-inclusive. We have a lot of people in there whose  
17 opinion really shouldn't matter.

18 Q. All right. And in response to your report, in  
19 regards to Mr. Van Liere's first report, what did he do?

20 A. So he went and collected some additional data in  
21 this -- in the region in which Roses operates and basically  
22 came to the same conclusion.

23 Q. And in your opinion, did Mr. Van Liere correct  
24 defects that you saw in his first opinion?

25 A. No. All he really did was just get data that was



1 for that particular part of the country but didn't address  
2 the whole issue of how valuable is that trademark because,  
3 again, almost half the respondents to his more  
4 narrowly-defined survey said that the Backyard brand was  
5 something that would make them more likely to buy the  
6 product.

7 Q. Now, Mr. Klein, this survey was conducted by  
8 showing respondents a series of web pages, correct?

9 A. That's correct.

10 Q. What is your understanding regarding the way the  
11 Backyard or the grills -- the Backyard Grill and the Backyard  
12 Barbecue grills are actually sold?

13 A. Well, it's my understanding that a very, very small  
14 percentage of the Backyard Grill products are sold over the  
15 Internet. And when you show people a web page, you're giving  
16 them a lot of information in sort of a list format, which is  
17 very different than the way they would see it if they went  
18 into a store -- into a Walmart store and inspected the  
19 product themselves. They may have to observe issues with the  
20 product as opposed to having them all listed out for them  
21 from which they can then pick, these are the things that I  
22 would focus on in making my decision.

23 Q. So was there any effort in Mr. Van Liere's  
24 supplemental survey to survey what respondents might shop for  
25 in a Variety store?

1           A.     No, there wasn't.

2           Q.     Was it still the case that the survey was screened  
3 only for Walmart shoppers and, therefore, there was no way to  
4 determine the impact on Variety customers who might see the  
5 Backyard brand they are familiar with in a Walmart store?

6           A.     That's absolutely correct.

7           Q.     And in your opinion is that a correct or incorrect  
8 way to conduct a survey of this sort?

9           A.     I don't want to get too deep in the weeds here, but  
10 to determine the value that a brand name brings to a product,  
11 there actually is a fairly well-established and  
12 frequently-used market research procedure in which you ask  
13 people to choose between a number of different products where  
14 you systematically vary things like the price, the brand  
15 name, the dimensions of the product and so on. And what  
16 you're able to do from that is learn what things are really  
17 important to people and what things aren't as opposed to  
18 giving them a list and asking them to pick from a list which  
19 things make them more likely to buy.

20          Q.     Now, in the supplemental survey that Mr. Van Liere  
21 did in response to your first critique, did he purport to  
22 measure any intention to purchase?

23          A.     No. There was no measure of intention to purchase,  
24 just, you know, this would make me more likely to buy, this  
25 would make me less likely to buy.

1           Q.     Now, Mr. Klein, is it true that given the lack of a  
2     valid control sale as discussed above, the appropriate  
3     conclusion to draw from the result is that the Backyard brand  
4     would influence the purchase likelihood for 46 percent or  
5     38 -- 138 of 300 respondents?

6           A.     Yes. I think that the -- Dr. Van Liere used  
7     Barbecue Grill as though -- as a control, but Barbecue Grill  
8     is -- just describes what it is. And these are Walmart  
9     shoppers and they're looking at the Walmart web page and it  
10    says Barbecue Grill at the top, and so we don't have any idea  
11    what they think the brand name really is. They may think  
12    it's -- for all we know, they could think it's Backyard  
13    because that's the brand that's sold at Walmart.

14                So whether there's -- he gets the same result when  
15    he says Barbecue Grill as when he gets -- when he says  
16    Backyard Grill isn't that surprising because it really isn't  
17    a control for guessing or anything like that. It's just,  
18    here's what people are thinking when they see just a  
19    description under the Walmart banner.

20           Q.     And finally, Mr. Klein, based on the factors you've  
21    just discussed, in your opinion is the Van Liere report --  
22    either the first or the second -- reliable and worthy of  
23    being relied upon by the Court and the jury in this case to  
24    document the facts it purports to document?

25           A.     Well, no, I don't think it -- I think it, in fact,

1 shows that the Backyard brand does have value to purchasers.

2 Q. In other words, almost half of individuals who see  
3 the brand would be more likely to buy the grill, correct?

4 A. That's correct.

5 Q. All right.

6 MR. ADAMS: No further questions.

7 THE COURT: Any cross?

8 MR. HOSP: Yes, your Honor. Would you prefer me to  
9 do it today or wait for tomorrow?

10 THE COURT: You'd better do it if you're going to  
11 do it.

12 MR. HOSP: Thank you, your Honor.

13 **CROSS-EXAMINATION**

14 BY MR. HOSP:

15 Q. One of your criticisms of Mr. Mantis' survey is  
16 that he shouldn't have used what's been referred to as an  
17 Eveready survey, correct?

18 A. That's correct.

19 Q. But you've done Eveready surveys in your career,  
20 right?

21 A. Yes, I have.

22 Q. You also criticized Mr. Mantis because he didn't  
23 use a control, correct?

24 A. That's correct.

25 Q. But isn't it true that in using a control, the only

1     thing it can do is bring the results down in terms of the  
2     number of actually confused people?

3           A.     Yes --

4           Q.     Can --

5           A.     Yes, but because of the other problem with using  
6     the Eveready survey, he was already depressing the results  
7     because not everyone in the -- in his sample was aware or  
8     was -- well, we don't know whether they were aware of  
9     Walmart's use of Backyard or not, but it seems unlikely that  
10    there was very high awareness of Backyard that would justify  
11    an Eveready survey. So once you've kind of already messed  
12    things up, adding or subtracting from -- using a control  
13    group, you know, it doesn't really matter. You're starting  
14    from the wrong place.

15          Q.     In any event, if he used a control it could only  
16    have lowered the level of confusion that he would have  
17    recorded, correct?

18          A.     That's correct.

19          Q.     And you haven't always used a control with an  
20    Eveready survey yourself; isn't that right?

21          A.     That's correct. If we -- if we do a survey and the  
22    results are low without the -- without a control group, I  
23    advise my clients that we don't need a control group. But I  
24    do that on situations where the -- it would certainly be  
25    reasonable to expect to hear the name of the alleged

1     infringing brand.

2           Q.     Let's talk about that a little bit. In fact, what  
3     you have opined, in your expert opinion there is no evidence  
4     that either of the marks in this case had been advertised or  
5     promoted enough for either of them to be well-known or widely  
6     recognized, right?

7           A.     Yes.

8           Q.     No evidence that either one had been advertised to  
9     be well-known or widely recognized. So they're weak marks,  
10    right?

11          A.     Well, I think that whether they're a strong or a  
12    weak mark, I'm not -- you mean commercially strong or --

13          Q.     Commercially strong.

14          A.     I don't think I'm in a position to say one way or  
15    another. I think that I'll stand by my statement that it's  
16    my understanding that the awareness for either one of them is  
17    relatively low. It doesn't mean it couldn't be higher if  
18    they decided they wanted to start advertising them more.

19          Q.     Right. Well, isn't it true that you have  
20    previously testified you don't believe that there has been  
21    any evidence presented in the case or shown to me that  
22    indicates the Backyard marks are well-known or widely  
23    recognized?

24          A.     That's what I wrote, yes.

25          Q.     Okay. And, in fact, you based that opinion at

1 least in part on what Variety's own lawyers told you, right?

2 A. In part, yes.

3 Q. So according to Variety's own lawyers, neither of  
4 these marks is very strong, correct?

5 A. No. I think neither of these marks are very  
6 well-known.

7 Q. Fair enough. Neither of these marks are very  
8 well-known.

9 A. That doesn't mean that people wouldn't -- couldn't  
10 be confused when they see them both -- when they go from one  
11 store to another and shopping for barbecue grills.

12 Q. And you didn't do any research to determine whether  
13 or not individuals go from one store to another and  
14 comparison shop, did you?

15 A. No, I didn't.

16 Q. One last question. Again, you've been asked how  
17 you would have done a survey if you had been asked by Variety  
18 to do a survey, right?

19 A. By you in my deposition or --

20 Q. I thought -- sorry.

21 MR. ADAMS: I didn't ask him that.

22 Q. (By Mr. Hosp) Well, let me ask you this: Did  
23 Variety ever come to you to ask you to do a survey?

24 A. No.

25 Q. They never asked you or indicated that they wanted

1 to actually find out from you whether or not there was a  
2 likelihood of confusion, did they?

3 A. They didn't ask me that, no.

4 MR. HOSP: Nothing further, your Honor.

5 THE COURT: Do you have anything else?

6 MR. ADAMS: Nothing else.

7 THE COURT: All right. We'll be in recess until  
8 9:30 tomorrow. Have a safe trip home.

9  
10 (Jury out at 5:12 p.m.)

11  
12 (Witness Excused)

13  
14 (Hearing concluding at 5:12 p.m.)  
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1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NORTH CAROLINA  
3

4 CERTIFICATE OF OFFICIAL REPORTER  
5

6 I, Michelle A. McGirr, RPR, CRR, CRC, Federal  
7 Official Court Reporter, in and for the United States  
8 District Court for the Eastern District of North Carolina, do  
9 hereby certify that pursuant to Section 753, Title 28, United  
10 States Code, that the foregoing is a true and accurate  
11 transcript of my stenographically reported proceedings held  
12 in the above-entitled matter and that the transcript page  
13 format is in conformance with the regulations of the Judicial  
14 Conference of the United States.  
15

16 Dated this 15th day of November, 2018  
17

18 /s/ Michelle A. McGirr  
19 MICHELLE A. MCGIRR  
20 RPR, CRR, CRC  
21 U.S. Official Court Reporter  
22  
23  
24  
25